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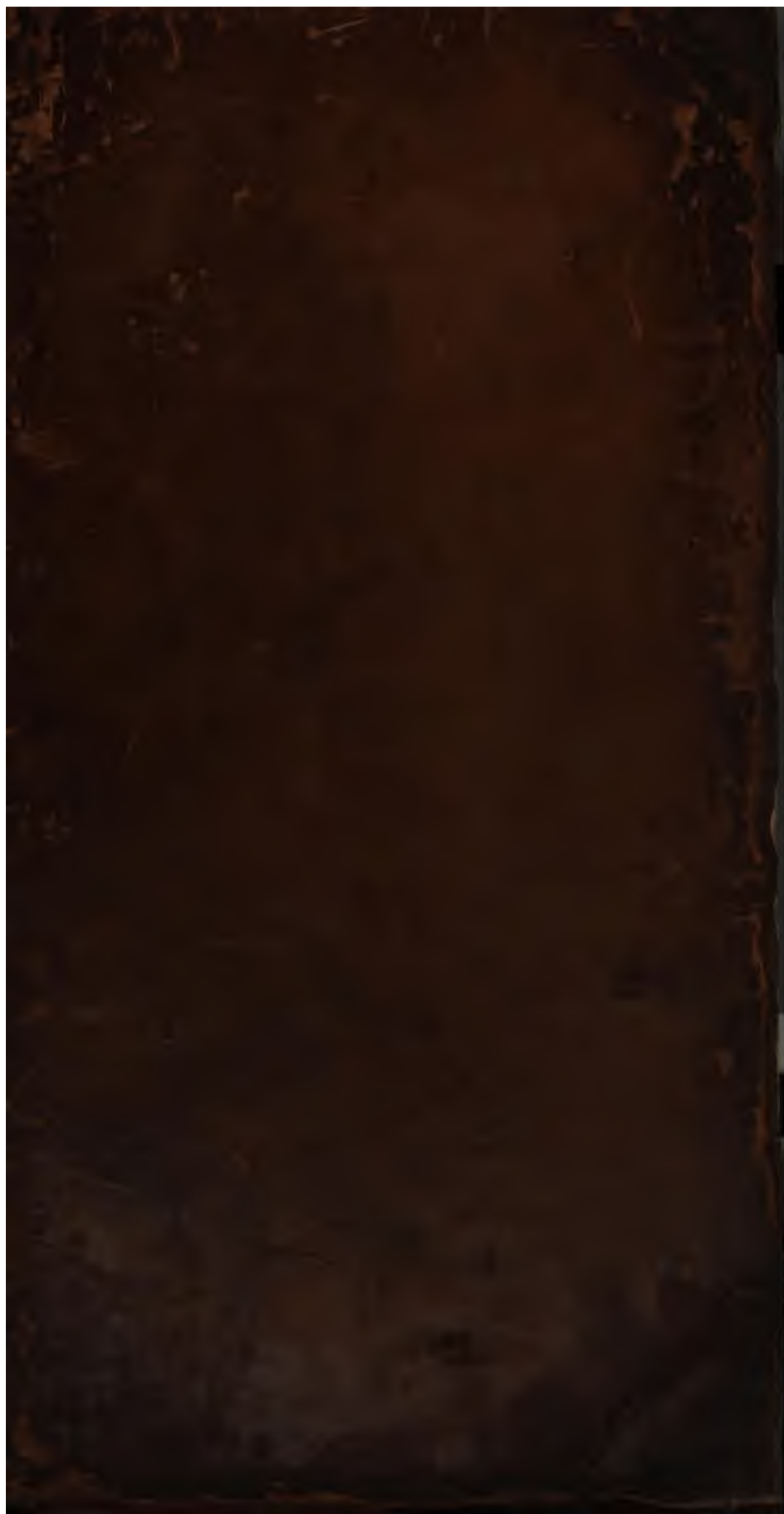
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R E P O R T S

OF

C A S E S

ADJUDGED IN THE

Court of King's Bench:

WITH SOME

SPECIAL CASES

IN THE

**Courts of Chancery, Common Pleas,
' and Exchequer,**

ALPHABETICALLY DIGESTED UNDER PROPER HEADS;

From the First Year of King WILLIAM and Queen MARY,
to the Tenth Year of Queen ANNE.

By **WILLIAM SALKELD,**

LATE SERJEANT AT LAW.

★
THE SIXTH EDITION:

Including the NOTES and REFERENCES of KNIGHTLEY D'ANVERS, Esq.
and Mr. Serjeant WILSON;

And large Additions of NOTES and REFERENCES to Modern Authorities
and Determinations,

By **WILLIAM DAVID EVANS, Esq.**

BARRISTER AT LAW.

IN THREE VOLUMES.

V O L. I.

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PRINTED BY A. STRAHAN AND W. WOODFALL,
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1795.





T O
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**MEMBER OF PARLIAMENT FOR THE BOROUGH OF
SALTASH, IN THE COUNTY OF CORNWALL,**

**ONE OF THE BENCHERS OF
THE HONOURABLE SOCIETY OF THE
INNER TEMPLE,**

A N D
CHIEF JUSTICE OF CHESTER,

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THIS EDITION.

THE Authority of the Determinations herein reported, being chiefly those of that eminent Lawyer Lord Chief Justice HOLT, has occasioned a very frequent republication of this Work, the reputation of which has no doubt been promoted by the opinion generally received, that the two first Volumes were originally made public under the care of Lord HARDWICK; having also been approved and recommended to the press by all the Judges of that period. The subsequent Editions were much improved by the addition of numerous References to later Authorities, by Mr. D'ANVERS, and of some others by Mr. Serjeant WILSON, which are for the most part preserved in the margin of the present Edition; to which are added a considerable number of Notes, containing an arrangement of the principal modern Authorities on the Cases and Points of Law occurring in these Reports. In the selection of these Authorities, the Editor has availed himself of the assistance of many recent publications, but in particular of the valuable

A D V E R T I S E M E N T.

Notes added to Mr. Cox's Edition of PEERE WILLIAMS's Reports, which, in some few instances, he has, for more complete information, literally transposed among his own Collection of Authorities.

The Third Volume of these Reports, consisting chiefly of the Author's detached Notes and Authorities of Cases, principally collected from other Books of Reports, under the same titles as in the two former Volumes, admitting of a less extended mode of annotation, the Editor has accordingly, in most instances, referred to the Authorities collected on each respective point in the former Volumes; and to such other later Authorities as have occurred to his notice on a careful examination of all the modern Determinations.

The Notes added in the present Edition are distinguished, being printed in double columns.

The Editor's residence at a remote distance, during the printing of this Work, having occasioned rather a numerous *Errata*, he has endeavoured to remove any inconvenience from that cause, by pointing them out, with their proper Corrections, in the respective Volumes.

LIVERPOOL,
April 16, 1795.

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Abate:

Abatement.

1. Duncombe *versus* Church.

[Mich. 8 Will. 3. B. R.]

ACTION *versus* Warden of the Fleet. The defendant *salvis sibi omnibus adv. ad bill. præd.* pleaded he was an officer of the Court of Common Pleas, and that no officer of that court can be sued *preterquam cor. justic. de C. B.* Plaintiff replies *quod tempore exhibitionis billæ* the defendant was in *custod. mar. Marefc. in quodam placito debiti ad se&c.* A. B. To this it was demurred, and the Court held,

Guardian del Fleet pleads privilege, pl. repl. quod fuit in custod. mar. adf. A. 3 Lev. 311. Comb. 390. 1 Ld. Ray. 93. S. C. Case; B. R. 102. Holt 538. Far. 105.

1. That want of a *prout patet per record.* is only matter of form, and helped by general demurrer, because without such conclusion, if a record be pleaded, the other side may reply *nul tiel record.* Vide 2 Ro. 275. 1 Saund. 98. This is no plea after imparlance.

Want of prout - patet per record. 3 Lev. 152. 5 Mod. 8. Co. Lit. 303. 2 Rol. Abr. 275. J. Raym. 34.

Far. 106. 2 Salk. 520, 545, 565. 1 Lev. 54. 2 Lev. 190, 197. Styl, 197, 385. 35. S. P. 2 Stra. 738.

2. Though a bill be filed against the warden as in custody, he may plead his privilege; for *per Holt C. J.* the difference is, where a person is here in actual custody, he is liable to all actions; but if he be here only upon bail, he may plead his privilege, for the sheriff cannot take notice of his privilege; so that he must give bail. Also this is no plea to the bill, but to the jurisdiction; and the clause of *salvis omnibus, &c.* ought to be to the jurisdiction as well as the bill.

Un in custod. mar. a vera son. priv. 3 Lev. 343. Post. 2. Hard. 365. 2 Rol. Abr. 275. G. 7.

2. Pease *versus* Parsons.

[Mich. 8 Will. 3. B. R.]

IN an action *versus* Parsons, he pleaded *quod ipse est unus attorn. Cur. Domini Regis de B.* without saying *fuit tempore impetrationis brevis*, and a *respondeas ouster* awarded. (a)

Quod ipse est attorn. without adding fuit temp. impetr. brevis, 2 Vent. 180.

ill. Post. 6. Mod. Cases 105. Cro. El. 315. Pl. 9.

(a) R. acc. *Strange* 854. *Ld. Raym.* 1567.

3. Jones *versus* Bodinner.

[Hill. 8 Will. 3. B. R. Rot. 382. 1 Ld. Raym. 135. 5 Mod. 310. S. C.]

Privilege of attorney of C. B. pleaded by defendant in cust. mar. after giving bail in another action. Vid. Carth. 370. Post 173 S. C. Comb. 379. Holt 149. Vi. Str. 191. [2]* Ante 1.

3 Lev. 343.
2 Roll. Abr. 274. 1.

Vi. Str. 191,
544, 864.
1 Wils. 306.
BL 1087.

BODINNER being an attorney of the Common Pleas was sued by J. S. in B. R. and gave bail, and was declared against as *in custodia*: The same term one Jones delivered a declaration by the bye against him: to which he pleaded his privilege: Plaintiff replied, that the defendant was *in custod. mar.* at the suit of J. S. and was delivered out to bail, and that during the continuance of that suit he exhibited his bill *secundum curf. Cur. &c.* Defendant demurred; and it was urged *pro quer.* That the defendant had allowed the jurisdiction of the Court by giving bail, and had waived his privilege. 2 Ro. 275. *Et per Cur.* defendant might plead his privilege to the first action, for he comes here by coercion, and had no opportunity to claim privilege till now; and therefore though a man be *in custod. mar.* one may claim *consuance*. 12 Aff. 83. 27 H. 6. 7. And it is absurd that the defendant should be in a worse condition as to J. S. than he was to the first plaintiff, when the second suit is topp'd on the action of the first plaintiff; and it is clear the defendant might plead his privilege to the first action, notwithstanding his being in *custod. mar.* Yet the Court held, that if it had been waived as to the first action, it would have been waived as to the second also.

4. Newton *versus* Rowland.

[Mich. 11 Will. 3. B. R. Rot. 197. 1 Ld. Raym. 533. S. C.]

Privilege of attorney of C. B. pleaded by H. sued as executor, and over-ruled. 2 Sid. 157. Post. 7. Noy 68. 2 Lill. 370. Poph. 329. 2 Rol. 275. H. 2. Cases B. R. 316. S. C. Post. pl. 18.

INDEB. *assumpsit* for 100 l. against the defendant as executor; he pleaded in abatement he was an attorney of the Common Pleas, and prayed his privilege, but was ruled to answer over; for his privilege extends only to actions brought against him in his own right. *Vide Hob.* 177. An attorney was sued as administrator; he pleaded in abatement that he was an attorney *de C. B.* and a *respondens ouster* awarded.

5. West *versus* Sutton.

[Paschæ, 1 Ann. B. R. 2 Ld. Raym. 853. S. C.]

Plea, alien enemy. Where the replication must

A *Scire facias* was brought on a judgment in assize, for the office of marshal; the defendant pleaded in abatement, that the plaintiff was an alien enemy; & *hæc, &c.* Plaintiff

Abatement.

2

Plaintiff replied he was a subject born, *sc.* at such a place in England. *Et hoc paratus est verificare*: Defendant demurred. *Et per Holt C. J.* The plaintiff should have concluded to the country; for where aliennee is pleaded in abatement, it is triable where the writ is brought; for which reason the replication must conclude to the country. *Aliter* where aliennee is pleaded in bar, therefore in that case the replication must conclude, *Et hoc paratus est verificare*.

conclude al pais, and where with averment. Vide Mod. Cases 57, 91. Far. 51, 53. 105. 1 Vent. 210. Co. Lit. 126. Dyer 121. pl. 14. Holt 3. S. C.

2. This cannot be pleaded in abatement to the *scire facias*, because it was pleadable in abatement to the assize: He shall not disable the plaintiff from having execution, since he admitted him able to have judgment (a). *Ideo considerat. est quod respondeat*.

Matter of disability which might have been pleaded to the action, not pleadable to *sci. fa.* on judgment.

1 Sid. 182. Post. 4, 274. Cumb. 86, 311. Cro. El. 283. pl. 7, 575. pl. 20. Co. Lit. 303. Rep. B. R. temp. Hard. 233.

(a) Vi. acc. Cowp. 728.

6. Brookes *versus* Stroud.

[3]

[Paschz, 1 Ann. B. R. Far. 39. S. C.]

TWO executors sued, and set forth to be executors, and that they themselves proved the will; but upon the probate set forth, it appeared that only one proved the will: Defendant pleaded this in abatement; *sed respondeas ousser* awarded, for both have the right in them, and he that did not prove may come in when he pleases, but cannot refuse during the life of him that has proved.

Action by two executors, and probate by one, held well. Post. 311, 317. 21 Ed. 4. 24. a. Yelv. 130. 2 Saund. 213. 9 Co. 37. a. 1 Rol. Rep. 176. Swinb.

358. Br. Executor 127, 168. Plowd. 184. b. Wentw. 59, 60. 1 Rol. 907. Cro. El. 92. Dyer 160. pl. 42.

7. Smith *versus* Villars.

[Trin. 1 Ann. B. R. Far. 38. S. C.]

VILLARS was arrested as *J. Villars, Armiger*, and pretended himself to be Earl of *Buckingham*; and upon a motion the question was, how he should put in bail so as not to estop him. *Et per Cur.* He need not join in the recognizance, and then there is nothing to estop him: In civil actions the defendant is not of necessity to be joined in recognizance, as in criminal; and even there upon motion we allowed the Earl of *Banbury*, upon an indictment, not to join in a recognizance, but to find others who gave bail for him, by the name of *G. Knowles, Esq*; for their act could not conclude him.

In civil actions not necessary for defendant to join in recognizance of bail, and in criminal may be dispensed with by the Court. Post. 47. Cumber. 65, 184. 3 Salk. 235. 6 Mod. 80, 303. 3 D. 256. p. 15. S. C.

8. Cross *versus* Bilson.

[Hill. 2 Ann. Intratur Trin. 2 Ann Rot. 146. 2 Ld. Raym 1016. S. C. quod *vide*. Pleadings. Lilly's Entries, 351.]

Replevin, plea,
Prisal in autre
lieu, concluded
pet. jud. & re-
turn. held ill,
because conclud-
ed in bar.
6 Mod. 102,
103. Fat. 53,
105. Comb.
479. Gibb.
on Dif. 150.

Replevin the plaintiff declared for taking his mare
apud H. in quodam loco ibidem vocat. the King's High-
way; defendant *venit & defendit vim & injur. &c. Et ut*
ballivus, &c. bene cognoscit captionem equæ præd. in quodam lo-
co voc. the King's Highway, & juste, &c. quia it was the
freehold of my Lord Lemster, *&c. absque hoc*, that he took
the mare in the place called the King's Highway; *et hoc,*
&c. unde pet. judicium & return. equæ præd. Plaintiff re-
plies, *Just. cognoscere non debet quia dic. quod cepit equam*
præd. in loco vocat. the King's Highway, & hoc pet. quod in-
quiratur per patriam; defendant demurs, and therein con-
cludes, *Et ut prius pet. judic. & quod narr. præd. cassetur.*
Plaintiff joins in demurrer.

1 Lev. 312.
1 Lut. 34, 35.
3 Lev. 291.

Per Cur. 1. This plea or cognizance concludes in bar;
for *pet. judicium & return.* was in bar at common law, da-
mages are only by the Stat. 7 H. 8. c. 4. 21 H. 8. c. 14.
Before the judgment was only to have a return. And
Prisal in autre lieu is but matter in abatement, which can-
not be pleaded in bar; and the conclusion is upon the
whole matter.

[4]

Snow. 155, 255.
3 Mod. 211. If
defendant makes
a discontinuance
by his demurrer,
plaintiff may
take judgment,
or join in demur-
rer. 1 Sid. 389.
Far. 97, 124.
1 Mod. 139.
Post. 179, 180.
Comb. 306, 323.
4 Mod. 402.
3 Salk. 283.
S. C.

2. If the demurrer was in abatement, then it was a
discontinuance, and the plaintiff might take judgment;
but nevertheless he was not bound to do it, and therefore
had his election, and might join in demurrer; and the
Court upon this joinder shall give him judgment in bar;
for the Court is not hindered by the conclusion of the de-
murrer in abatement to give judgment, as of right they
ought, upon the whole record.

3. This demurrer might be taken for a demurrer in bar,
because it concludes *ut prius pet. judicium & quod, &c.*
and the Court will reject the *& quod, &c.* as being idle
and repugnant. Judgment *pro quer.* after several mo-
tions and debates. *Petgelly pro quer. Salkeld pro def.*

9. Ode *versus* Norcliffe.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 899. S. C. not S. P.]

Replication to
plea in abate-
ment ill, for
want of venue.
Vide Record,
Post. 707.
Far. 97. S. C. in totidem verbis.

PLEA that he was attorney *de C. B.* and ought not to be
sued *alibi absque consensu*; Plaintiff replied, he did
consent and laid not a venue where, and therefore bad.
Per Cur.

10. Haywood *versus* Davies & al.

[Mich. 1 Ann. B. R. Rot. 344. Farresley 104. S C.]

TRESPASS *versus* A. & B. for taking a pail of water out of the plaintiff's well; *A. & B.* pleaded in abatement that *B.* was tenant in common with the plaintiff of the said well; plaintiff replied he was sole seized, *absque hoc*, that he was tenant in common with the defendant *B.* *Et de hoc pon. se super patriam.* To this it was demurred, and a *respondeas ouster* awarded; it was agreed that in trespass the defendant cannot plead in abatement, that himself is tenant in common with the plaintiff, because he may give it in evidence; but on the other side, he may plead that another is tenant in common with the plaintiff, for that will not prove him Not guilty: But the point insisted on was, Whether the plaintiff should not have concluded his *absque hoc* with an averment; And the Court seemed to think that where an *absque hoc* comprises the whole matter generally, as *absque tali causa*, it may conclude *Et de hoc pon. se super patriam* (a), but where it only traverses a particular matter, as *absque tali warranto*, &c. it ought to be averred; but the Chief Justice thought not this such a particular matter as need be averred, for it is to maintain his writ. *Vide Dy. 333, 353. 1 Brownl. 1 Lev. 261. 2 Keb. 380.*

Defendant cannot plead in abatement tenancy in common in himself, but in a stranger he may. Cro. El. 554. 2 Salk. 708. Vide Admiralty 1. Sir Josiah Child's Case. Where traverse to be concluded with averment, and where to the country. Ante 2. Comb. 86, 311. Co. Lit. 126. a. 2 Rol. Rep. 63. 1 Keb. 776.

(a) *R. Doug. 93. Vi. Str. 871. 1 Burr. 317. Doug. 429. (413) note 1.*

11. [Michaelmas, 1 Ann. B. R.]

UPON a *respondeas ouster*, the defendant pleads the general issue: the plaintiff shall sign judgment if the defendant's attorney on re-delivering back a copy of the issue will not pay for it; and it seems the old course was, to deliver in a copy of the whole record; viz. the declaration, plea in abatement, &c. and issue; but the Court made a rule for the future that a copy of the narr. and issue should only be paid for. *Per Cur.*

[5]
Far. 51.

12. Presgrave *versus* Saunders.

[Mich. 2 Ann. B. R. Intratur Mich. 1 Ann. Rot. 467.]

REPLEVIN for several goods taken in a chamber in Devereux-Court; defendant pleaded *actio non quia dic quoad* such and such, *proprietas eorum fuit ipsi def. absque hoc*, That the property of them was in the plaintiff, &c.

6 Mod. Rep. 81. S. C. Holt 562. 2 Ld. Raym. 984. S. C.

Replevin; property in a stranger is pleadable either in bar or abatement, at

election. Post. *hoc paratus est verificare*; & quoad others dicit quod proprietas eorum fuit in quodam Richardo Frith, absque hoc, quod Carth. 243. fuit querenti, & hoc paratus est verificare. Unde p̄t. judic. Mod. Cases 69, 103. *si p̄d. quer. actionem suam habere debeat*, &c. p̄t. etiam return. bonorum, &c. cum dampnis, &c. Upon demurrer Mr. Ward objected, that property in a stranger ought to be pleaded in abatement, and not in bar. *Cur. contra*: It has been adjudged otherwise, and the law is otherwise, for it utterly destroys the plaintiff's action: and, whether the defendant or a stranger have the property, it is all one to the plaintiff since he has it not. *Vide* 31 H. 6. 12. 39 H. 6. 35. 2 Lev. 92. 1 Ven. 249 (a).

(a) D. acc. Comyns, 247.

13. Earl of Banbury *versus* Wood.

[Mich. 2 Ann. B. R. Rot. 398. 2 Ld. Raym. 987. S. C.]

Vide Record, page 705.

6 Mod. 84.

2 Ld. Raym.

987. S. C.

3 Salk. 20.

Holt 41.

Want of addition

pleaded in

homine replegi-

ando. 2 Inst.

665. Cro. El.

396. Mod. Cases

115, 198. Exi-

gent given in

repl. by statute

of E. 3.

Original in statute of additions intends such original as the Court proceeds upon.

IN a *homine replegiando* defendant appeared and pleaded in abatement, that there is no addition of place, vill, or hamlet: Plaintiff demurred; for replevin is not *vi & armis*, and in actions *vi & armis* process of outlawry lay only, and no addition is necessary where such process lay not: And the 25 E. 3. c. 17. does not extend to replevin, *Et per Cur.* Process of outlawry lies in replevin, and the king may have a fine. *V.* 25 H. 6. 6. 2 Ro. 805. n. f. 1 Inst. 128. b. Pl. 228. N. Br. 220. H. But this is not by common law nor upon the original; but the statute of Edw. 3. gives the exigent, and that is upon the *pluries* returned; for the original is *vicountiel*, and is determined: The words of the statute of H. 5. are, *In every original in actions personal whereon process of exigent lies*, &c. That statute is construed strictly. And an assize of *novel disseisin* is not within it, though the king shall have a fine; and exigent lies, because it is a mixed action. So here it must be such an original as the Court does proceed upon, not such an original as is determined; for the Court does not proceed upon that: In this case the original replevin is *vicountiel*, and the Court proceeds upon the *pluries*; therefore the first replevin needs no addition within the statute; and where the first writ is without addition, it cannot be necessary in the second; nay, it is so far from that, that the inserting such an addition would vitiate the second writ; for where any writ or process is founded upon a former, it must pursue the former, and cannot vary. *Et per Poulet*, An addition was never seen in a writ *de homine replegiando*.

[6]

Where one process is grounded on another, the latter must pursue the former exactly. Mod. Cases 85. 4 Mod. 347. Noy 135.

14. Lett *versus* Mills.

[Hill. 2 Ann. B. R.]

DEFENDANT pleaded in abatement *quod suscepit ordinem militarem & jam miles existit*; and upon demurrer it was held, first, That *quod suscepit ordinem militarem*, &c. was a very proper way of expressing he was made a knight. *V. Statute de militibus*; and that *miles* without addition is a knight bachelor. 2. That there needs no *venue* where he was dubbed; for any thing that concerns his person shall be tried where the action is laid (*a*). Yet at last a *respondeas ouster* was awarded, *quia* not said he was knight before, or at the time of the bill exhibited.

(a) Vi. 2 *Ld. Ray.* 1504. *Sir.* 775.

6 Mod. 105.
S. C. 2 *Ld.*
Raym. 1514.
by the name
Nutt ver. Mills,
Plea, *quod suscepit ordinem militarem*, &c. Matter that concerns the person need not be pleaded with *venue*. Ante 2.
5 Mod. 310

15. Holman *versus* Walden.

[Hill. 2 Ann. B. R. 2 *Ld. Raym.* 1015. S. C.]

ACTION of the case was brought for words against Benjamin Walden; defendant pleaded in abatement that he was baptized by the name of *John*, & *per nomen & cognomen de John Walden semper*, &c. *cognitus & vocatus fuisse*, *absque hoc*, that he was called or known by the name and surname of Benjamin Walden; plaintiff replied, He was called and known by the name and surname of Benjamin Walden; & *hoc petit quod inquiratur per patriam*: Defendant demurred, and it was urged that the material part of the plea was the name of baptism, and that he could not have another name; and that the traverse was needless and frivolous, and the matter precedent was the substance of the plea: To this opinion *Powel* Justice at first inclined; but at last a *respondeas ouster* was awarded *per tot. Curiam*; for *per Holt C. J.* one may have a *nomen & cognomen* that never was baptized, and thousands in fact have: Also one may be baptized by the name of *A.* and be confirmed by the name of *B.* as *Sir Francis Gaudy* was; not that he thought the first name ceased. Also he thought it would not be a sufficient answer for the defendant to say he was baptized by the name of *A.* without averring also, that he was ever called and known by that name: But supposing it had been a sufficient answer without more, yet saying he was baptized, &c. was no more than inducement, which is waived by the traverse; so that the effect of the plea is, that the defendant was never called by the name of *A. B.* and the Chief Justice said that the traverse was material, and likewise the inducement. *Jud. quod respond.*

6 Mod 115. by the name of Walden ver. Holman 225. Holt 492, 563. S. C. Misnomer pleaded. Traverse of the name in the writ is the point of the plea. But both that and the inducement are material.

1 Inst. 3. 2.
Cro. Jac. 558.
4 Mod. 347.
Cro. El. 897.
2 Brownl. 48.
2 Rol. Abr.
135. Far. 15, 28.
2 Salk. 451, 512.
Post. 50. 6 Co.
53. 1 Show.
298. Noy 135.
[Rep. B. R.
temp. Hard,
286.]

6 Mod. 198.
Holt 41.

16. Lepiot *versus* Browne.

[Hill. 2 Ann. B. R. S. C.]

2 Inst. 670. Additions at common law by Senior and Junior. Where no addition the father intended *prima facie*. Hob. 330. Any matter that distinguishes the person makes addition of Senior and Junior not necessary. Styl. 394. 2 Rol. Rep. 225.

ONE brought up by *habeas corpus*, and in *custod. mar.* was declared against by the name of *A. B. de D. in custod. mar.* Defendant pleaded in abatement, that his father lived in *D.* likewise, and that his name was *A. B.* and so because there was no addition *pet. jud. de billa*; and it was urged, that though this be by bill, and not within the statute of additions, yet by common law there ought to be an addition to distinguish father and son, *viz. junior* and *senior*; and if the son be sued, there ought to be an addition; *aliter* if the father. *Vide Rast.* 310. 3 H. 6. 54. 55. 37 H. 6. 29. *b. a.* 4 E. 3. 31. 8 E. 3. 50. 21 H. 6. 26. *b.* 5 E. 4. 25. *Per Holt C. J.* If father and son are both called *A. B.* by naming *A. B.* the father *prima facie* shall be intended; but if a devise were to *A. B.* and the deviser did not know the father, it would go to the son: Suppose one deals with the son, and knows nothing of the father, must he bring his action *v. A. B. junior*? If this had been an original, and the father and son had lived in different counties, there had been no need of this addition; but this is an action *v. A. B. in custod. mar.* you must shew there is *A. B.* the father *in custod. mar.* too. Judgment *quod respond. ouster nisi.*

6 Mod. 225.
S. C. 311.
3 D. 227. p. 2.
268. p. 5.

17. Linch *versus* Hooke.

[Mich. 3 Ann. B. R.]

Feme covert after arrest and bail bond given by a wrong name, may plead the misnomer. If a person binds himself in a bond by a wrong name, he is estopped to say it is not his name. 1 Rol. Abr. 872. Ow. 1, 2, 3. Sty. 187. Lutw. 295. Mod. Cases 28, 225. 311. Far. 164.

A Woman was arrested by name of *Minors*, and gave a bail-bond to the sheriff by that name. *Et per Cur.* If one be arrested by a wrong name, and brought into Court, he may plead misnomer; and whatever a bail-bond may do in other cases, in case of a *feme covert*, she may plead, it cannot estop her; for she may plead *non est factum*; *per Cur.* *Et per Cur. eodem termino* in another case it was said, If *A.* give bond by name of *B.* and he is accordingly sued by that name of *B.* he may plead misnomer, and the other may reply that he made the bond by the name of *B.* and estop him by demanding judgment, if against his own deed he shall be admitted to say his name is *A.* and then he may rejoin and say that he made no such deed; and this he must do without oyer, for if he pray oyer, he admits his name to be *B.*

18. Lawrence *versus* Martin.

[Hill. 4 Ann. B. R.]

Respondens custer. Hob. 177. Ante 2. 1 Ld. Ray. 333.

AN attorney was sued as administrator; he pleaded in abatement, that he was an attorney *de C. B.* and a *respondens custer* awarded. *Nota* upon a *respondens custer*,
no

Abatement.

8

no notice need be given of it; for the defendant is supposed to be attending upon his cause in the paper, to maintain his plea. *M. 3. An. B. R. per Holt C. J.*

2 Rol. 275.
H. 2. Holt 46.
S. C.

19. Stroud *versus* Lady Gerrard.

[Mich. 6 Ann. B. R. Intratur Mich. 5 Ann. 439]

Vide Record,
page 710.

ASSUMPSIT for work done *versus* Eliz. Gerard; defendant pleads in abatement her name was Honoria, and not Eliz. Plaintiff replies *quod imposuit commune ballium per nomen Eliz.* and prays judgment if she shall say her name is not Eliz. *Et per Cur.*

Misnomer apud
com. bail filed.
V. ante pl. 15,
Honoria. Quod
per nomen illud
comperuit, im-
posuit bail,
Styl. 187. 2 Inst.
670. Dyer 88.
1 Roll. Abr. 780.

The putting in bail is the act of the Court and not of the party, and therefore cannot estop her; but the defendant appearing by that name may estop himself; and bail is an appearance as well as bail. But then it ought to be pleaded as an appearance, if the plaintiff will make use of that as an estoppel. In debt on a bail-bond, if the defendant has put in common bail, he cannot plead he has put in common bail, but *comperuit ad diem*; for he must plead according to the operation things have in law.

20. Hetherington *versus* Reynolds.

[Mich. 6 Ann. B. R.]

AN action of debt was brought against the defendant as a *feme sole*; in the palace-court after appearance and plea pleaded she married, and then removes the cause in *B. R. per habeas corpus*; and here the plaintiff declares against her in *custod. mar.* Defendant pleaded in abatement, she was married at the time of the *habeas corpus* sued out; and ruled a good plea (*a*); for here the proceedings are *de novo*, and the Court takes no notice of the proceedings below, or of what preceded the *habeas corpus*; but the course in such case is to move the matter to the Court upon the return of the *habeas corpus*, and the Court will grant a *procedendo*; for though a *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the Court may refuse it.

Habeas corpus,
marriage after
suit in interior
Court commen-
ced, pleadable in
abatement in the
superior Court
after removal.
But on moving
that matter for
return hab. cor-
pus, Court will
grant proceden-
do. 2 Keb. 143.
Sid. 40. Cro.
Car. 104. Rep.
A. Q. 142. S. C.

(a) R. contra Barnes, 355.

21. [Michaelmas, 6 Ann. B. R.]

EJECTMENT laid in *Devonshire* to be tried at *Exeter*; the defendant died the day before the assizes began at *Exeter*, and upon a trial on full evidence, verdict

Death of de-
fendant before
the commission-
day, does not

pro

by the statute;
but if after com-
mition-day it is
aided.

3 Lev. 120.

1 Sid. 131.

Far. 39. An-
drews 47.

[9]

0 Mod. 142.

Rayn. 210.

1 Lev. 277.

1 Vent. 255.

1 Mod. 6.

pro quer. and motion in arrest of judgment. *Et per Cur.* First, the death of either party before the assizes is not remedied by the statute: but if the party dies after the assizes begins, though the trial be after his death, that is within the remedy of the statute; for the assizes is but one day in law: and this is a remedial law, and shall be construed favourably. 2. The Court held that in this case it was in their discretion, whether they would upon motion arrest judgment, or put the party to a writ of error: accordingly they refused to arrest the judgment, and the party was put to his writ of error, that the point might be put in issue and tried by a jury.

Nota. Where one has two causes of action, and, of his own shewing, has no other remedy for one of them, the suit shall abate only so far as the writ is abateable; but if he may have another writ for the whole, it shall abate entirely. *Cases Temp. Ld. Hardwicke* 373.

Account.

I. Wilkin *versus* Wilkin.

[Hill. 2 W. & M. B. R.]

Shower 71. Assumpsit. Defendant pleads in abatement, that he was bailiff, and plaintiff ought to bring account. Where express promise is, assumpsit lies as well as account. Carth. 89. Dyer 20. 1 Inst. 172. 1 Rol. Rep. 42. Mod. Cases, &c. 363. Comb. 147. S. C. Holt 6. 4 Rep. 93.

ASSUMPSIT, and declares, that the defendant intending to go beyond sea, he delivered him a box and goods, which the defendant promised to dispose of for him, and to give him an account thereof at his return. Defendant pleaded in abatement, he was the plaintiff's bailiff, and merchandized the said goods, and that he ought to bring account, and not an action on the case: *Non allocatur*; for the action being grounded on an express promise, *assumpsit* lies as well as account, and the plaintiff has his election. *Note*; the objection was, that in account against the defendant as bailiff, he would have allowances, &c. *Et per Holt*: There is some inconvenience in giving a long rambling account in evidence to a jury: But wherever one acts as bailiff, he promises to render account. *Jud. pro quer.*

2. Poulter *versus* Cornwall.

[Trin. 5 Ann. B. R.]

INDEBIT. *assumpsit* for money received *ad computandum*. Verdict *pro quer.* and moved in arrest of judgment, that this action did not lie, but account: For if a man receives money to a special purpose, as to account, or to merchandize, it is not to be demanded of the party as a duty, 'till he has neglected, or refused to apply it according to the trust under which he received it: and the declaration must shew a misapplication, or breach of trust. *Et per Cur.* The verdict has aided this declaration, for it must be intended there was proof to the jury, that the defendant refused to account, or had done somewhat else that rendered him an absolute debtor.

Cm. El. 644.
1 Roll. Rep.
259. Owen 86.
Hob. 209. In-
debit. *assump-*
sit for money
received *ad com-*
putandum.
Aided by ver-
dict. 1 M.
Cases 239. S. C.

Action in General,

[10]

1. Rogers *versus* Cook.

[Trin. 4 W. & M. B. R.]

H. Brought an action as administrator to *A.* and declared on an *indebitatus assumpsit* to *A.* and an *insimul computasset* between plaintiff and defendant for money due to the plaintiff himself. Upon demurrer the declaration was held ill; for the plaintiff in one action cannot prosecute his own right and another's: and the reason is, because the costs to be recovered are entire, and then the plaintiff can never distinguish how much he is to have as administrator, and how much he is to hold as his own (*a*).

Eliz. 290. 8 Co. 87. Cro. Jac. 330. Ow. 11. 1 Wilson 171. S. P. 2 Str. 1271. S. P.
Andr. 358. S. P. Hob. 88. 2 Lev. 27, 110, 228. Dan. 4. Show. 366.

Carth. 235. S. C.
Show. 366. Ac-
tion by adminis-
trator. *Indebi-*
tatus assumpsit
to intestate, and
insimul compu-
tasset for money
due to adminis-
trator, not join-
able. 2 Salk.
423. 1 Roll.
Abr. 29. Cro.

(*a*) *R. ac.* upon judgment by default.
Hooker v. Quilter. 1 Wils. 171. 2 Str.
1271. An executor may join in the
same declaration several counts for mo-
ney had and received to the use of the
testator, and to the use of the executor
as such. *Petrie v. Hannay.* 3 T. R.

659. In an action against an executor,
a count on a promise made by him to
pay money received as such, cannot be
joined with counts on the promises of
the deceased. *Jennings v. Newman.*
4 T. R. 347.

Vide Record,
page 703.

2. *Sir John Dalston versus Janſon.*

[M. 7 W.3. B. R. Intratur Paſch. 7 Will. 3. Rot. 242.]

Assumpſit on
cuſtom of realm
and trover not
joinable in action
againſt carrier.

Raym. 233.

1 Lev. 109.

1 Keb. 847.

pl. 45. 870.

1 Vent. 365.

2 Keb. 803. pl. 52.

3 Lev. 99. 1 Vent. 223.

3 Mod. 90. S. C.

Comb. 333. 3 Salk. 204.

Caloſ B. R. 73.

Miſſeance and negligence may be joined with trover.

IN assumpſit on the cuſtom of the realm and trover
againſt carrier joined in the ſame declaration; after
verdict for the plaintiff and entire damages, judgment was
arreſted; for the *assumpſit* is *ex quaſi contractu*, and a con-
tract and tort cannot be joined; and in the caſe of *Mat-*
thews and Hepkins, 1 Sid. 244. the judgment was arreſted,
the record of which caſe Holt C. J. ſaid he had ſeen (b).

(b) In *Dickon v. Clifton*, 2 Wils. 319, Counts ſtating that the plaintiff was owner of a veſſel, of which he employed the defendant as maſter, by whoſe negligence goods were loſt, were held well joined with a count in trover. The Court ſaid, that two counts may be joined where there is the ſame judgment on both. Gould J. thought that trover and caſe againſt a carrier might be joined. *Muſſ v. Goodſon*. 3 Wils. 348. Count, that defendant agreed plaintiff ſhould erect a yard in his cloſe, and that when erected he obſtructed him in the enjoyment of it, held well joined with trover, being both actions on the caſe for torts; but the teſt ſuggeſted in *Dickon v. Clifton* was thought too large, and not univerſally true, though it may be a good rule among others to try the point by. *Brown v. Dixon*, 1 F. R. 274. A count on trover for a dog was joined with others, ſtating that the plaintiff had lent a dog to the defendant to be

returned, which the defendant did not return, but detained for an unreaſonable time, until by his careleſſneſs it was loſt, and the declaration was upon ſpecial demurrer held good. Buller J. ſaid, perhaps the rule of judging whether two counts can be joined, by conſidering whether the ſame judgment can be given on both, is not true in its extent, but by adding another requiſite it is univerſally true; for *wherever the SAME PLEA may be pleaded, AND the SAME JUDGMENT given on two counts, they may be joined* in the ſame declaration. *Assumpſit* and *tort* cannot be joined together, becauſe the pleas to both are not the ſame. The common way of declaring againſt a carrier now is in *assumpſit*, to which trover cannot be joined; but if the plaintiff declare on the cuſtom of the realm, a count in trover may be joined; it only depends on the form of the action. *Vi. 2 Bl. Rep.* 848. *Gillb. C.* p. 7. *Comyns*, Action G.

3. *Johnſon verſus Long.*

[Mich. 10. Will. 5. B. R. Intratur Trin. 10 Will. 3. Rot. 763.
1 Ld. Raym. 570. S. C.]

New action for
the erection of
nuſance barred
by prior reco-
very for the

ACTION ſur le caſe, for erecting a nuſance 20 *dis*
Fetr. Defendant pleaded a prior action brought for
erecting a nuſance 20 *dis Martii*, and a recovery there-
upon, and avers theſe to be the ſame nuſance and erec-
tion:

Action in General.

† 10

tion: Plaintiff demurred, and judgment against him; for he may have an action for the continuance of the same nuisance, but can never have a new action for the same erection.

same, though laid at different days. Carth. 455. Cro. Jac. 74. Yelv. 67. 4 Co. 45. 2 Vent. 169.

Mo. 762. 2 Leon. 129. Cro. El. 402. pl. 11. Cro. Jac. 231. pl. 10. Carth. 455. S. C.

4. *Pitts versus Gaiace and Foresight.*

[Pas. 12 Will. B. R. 1 Ld. Raym. 558. S. C.]

2 Bb Add. 8167.

ACTION *sur le case*, for that he was master of a ship, and that it was laden with corn in such a harbour, ready to sail for *Dantzick*, and that the defendant entered and seized the ship, and *detained her, *per quod impeditus & obstructus fuit in viagio*. Defendant justified for toll and port duties; but his plea being naught, took this exception to the action, *viz.* That it should have been trespass. *Vide 4 E. 3. 24. Palm. 47. 13. H. 7. 26. Holt C. J.* In the cases cited, the plaintiff had a property in the thing taken; but here the plaintiff has not a property; the ship was not the master's but the owner's; the master only declares as a particular officer, and can only recover for his particular loss. Yet he might have brought trespass as a bailiff of goods may; and then as a bailiff he could only have declared upon his possession, *sc.* that he was possessed; which is sufficient to maintain trespass (a). Judgment *pro quer.*

Case or Trover, quod fuit magister navis, and defendant detained her per quod impedit in viagio. Holt 12. S. C. Held well for the special damages, but that he might have had trespass on his possession. Br. Action sur le Case, 123. All. 84. Fitz. Action sur Case, 1 Roll. Abr. 104. 2 Roll. Abr. 556. Lane 65, 66. Cro. Jac. 265, 266. 4 Co. 91. 2 Cro. 50. Com. Dig. 3 Ed. vol. i. p. 158. Action M.

*[11]

(a) It is clear that for a mere trespass an action on the case will not lie; and questions frequently arise whether case or trespass is the proper action. As a general rule it is agreed, that where the injury is immediate the action should be trespass, and where it is consequential it should be case. The present is an instance in which either action would be maintainable, the principle of which seems correctly stated by Mr. Wedderburn in *Harker v. Birbeck*, 3 Bur. 1561. "Both actions may lie where there is both an immediate and also a consequential injury; and the plaintiffs therein, being entitled to both actions must have their election to proceed in either."

In *Shapcott v. Mugford*, 1 Ld. Raym. 187. Case was brought against a parson for not taking away tithes in a convenient time, *per quod* the plain-

tiff's land was injured; and it was objected that it should have been trespass, but the Court held that case was proper. So in *Haward v. Banks*, 2 Bur. 1113, case was brought for damage to the plaintiff's colliery by what the defendant had done in his own colliery; and the same objection was made and over-ruled. In *Reynolds v. Clarke*, 2d Ld. Raym. 1399. *Forsc.* 212. *Sir.* 634. Trespass was brought against the defendant, who had a right for the rain to fall from the eaves of his house into the plaintiff's yard, for putting up a spout to collect the water, and make it fall in a larger body,—it was ruled that the action should have been case. So where trespass was brought against excise officers, who entered by a legal warrant into a house to search for stolen goods, though none could be found. *Beot v. Cooper* cited.

1 Term

1 *Term Rep.* 535. In the above-mentioned case of *Harker and Birbeck*, case was brought by the plaintiff who was in possession of a lead-mine, against the defendant for raising ore thereout, and it was ruled that it should have been trespass, *Gates v. Bayley*; 2 *Wils.* 313. Trespass for impounding a hog, and keeping it so closely that it died. The defendant justified the impounding, and the justification being found for him, he had judgment; the death not being sufficient to support trespass without a replication that it was by abuse which would make the defendant a trespasser *ab initio*. *Scott v. Shepberd*; 3 *Wils.* 403. 2 *Bl.* 892. Trespass and assault was adjudged to be properly brought against the defendant, who threw a lighted squib into a crowded market-place, where it fell upon the stall of A; and B, to prevent injury to himself, and the wares of A, threw it across the market-place, when it fell on the stall of C, who, to save himself and his goods, threw it to another part of the market, whereby it struck against the plaintiff's face and put out

his eye. [In the case last mentioned there is much learning on this subject]. Case and not trespass lies for disturbing a person in his pew; *Sticks v. Booth*, 1 *T. R.* 428. Where debauching a man's daughter is accompanied with an illegal entry of his house, he may either bring trespass for the entry, and lay the debauching and loss of service as consequential, or may bring case merely for debauching *per quod, &c.* *Bennett v. Allcott*, 2 *T. R.* 167. Where a justice of peace maliciously grants an illegal warrant, by which the plaintiff is imprisoned, the action *must* be trespass. *R.* on special demurrer, *Morgan v. Hughes*, 2 *T. R.* 225. An action against a sheriff for taking, under an execution against B, the goods of A, in a house let ready furnished by A to B, *must* be case. *Ward v. Macauley*; 4 *T. R.* 489.

When the plaintiff has an election to bring either trespass or case, the latter is preferable, as the *stat.* 22d and 23d *Cha.* 2. does not in that action prevent the recovery of full costs if the damages are under 40 s.

5. Fetter *versus* Beale.

5 *Rob.* 267.

[*Trin.* 13 *Will.* 3. *B. R.* *Intr. Pas.* 10 *Will.* 3. 1 *Ld. Raym.* 339. *S. C.*]

Assault, battery, and maihem, the plaintiff's declaration recites judgment in a former action for the same battery, and shews new consequential damages happened since. *Cro. Jac.* 373. pl. 3, 555; 18. 13 *Ed.* 2. c. 24. *Ante* 10. pl. 3. *Cases B. R.* 542. *S. C.* *Holt* 17. 1 *Mod.* 542. 4 *Co.* 43. 1 *Leon.* 319.

IN an action for assault, battery, and maihem, declares that the defendant beat his head against the ground, and that he brought an action of assault and battery for that, and recovered; and that since that recovery, by reason of the same battery, a piece of his skull was come out. The defendant pleaded the recovery mentioned in the declaration in bar, and avers it to be for the same assault and battery: The plaintiff demurs. And *Shower pro quer.* urged this subsequent damage was a new matter which could not be given in evidence on the first recovery, when it was not known; and compared it to the case of a nuisance where every new dropping is a new act. If a man beat my servant, and he die, I lose my action, and must proceed by indictment; and by the same reason that a matter *ex post* may defeat an action, it may also give an action: *Sed Holt C. J. contra.* Every new dropping is a new nuisance, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which

Action sur le Case.

† 11

which the jury must be supposed to have considered at the trial. Judgment *pro def.*

Nota. Per Lord Hardwicke Ch. J. & Car. The general distinction taken between *torts* and *contracts* is right. In *contracts* it is necessary to prove all the charges in the declaration exactly in the manner they are laid: But in *torts* they are several; and if you prove one of them, you sufficiently prove your case. *Cases Temp. L. Hardwicke* 55. 2 *Strange* 977.

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This is a liberal action. See 2 Burro. 906, 1011, 1012, &c.

1. *Payne versus Partridge & al.*

[Trin. 3 Will. 3. B. R. Intratur Pasch. 2 W. & M. Rot. 43.]

Vide Record, page 719.

DECLARES that the vill of *Littleport* is an ancient vill, and that there has been time out of mind a ferry over the river there, and that it was a common passage for all the king's people paying toll, and that the inhabitants of *Littleport* living in the ancient messuages or cottages there, had passage toll-free; and that the defendant was owner of the ferry, and let it decay, and that the plaintiff requested him to let him go over the ferry, but he refused. Defendant pleaded, he had built a bridge in the place of it, &c. And upon demurrer the Court held the owner could not let down the ferry and put up a bridge without license and an *ad quod damnum*; and that the custom was good in the nature of an easement, but that the custom consisted not in the right to pass, for that was common to all the king's subjects, but in the right to pass toll-free. That therefore the plaintiff could not maintain an action, for not passing; for so any other subject might bring an action, which would be endless, and infinite. *Aliter*, If toll had been exacted and paid by him, that had been a special damage, but without special damage he can only indict or bring information.

Carth. 191.
1 Show. 243,
253. 3 Mod.
289. Post. 16.
Show. 255. S.C.
Common ferry
for all passengers
paying toll, (but
the people of A,
who are toll-
free). One of
A. may bring an
action for taking
toll, but not for
not keeping up
the ferry, because
the former is a
private right, but
the latter a pub-
lic. Owner of
ferry cannot sup-
press that, and
put up a bridge
in its place,
without license
and *ad quod*
damnum. 2 Jon.
157. Cro. Car.
132, 265, &c.

132, 266, &c. Vaugh. 341. Mod. Cases 307. 1 Leon. 142. 1 Inst. 113. 12 H. 8. 5.
1 Cro. 418. 1 Inst. 56. a. 5 Rep. 72. 3 Cro. 664. Moor 180. 13 H. 7. 26. Comb.
180. S. C. Holt 6. Davis 57. 3 Mod. 289.

2. Williams *versus* Carey.

[Pasch. 7 W. 3. B. R. Intr. Pas. 6 W. 3. 1 Ld. Raym. 40. S. C.]

Action by executor for a false return of fieri facias in the lifetime of testator, held well within Statute 4 E. 3 c. 7. 4 Mod. 403. Difference between mesne process and execution as to this action. Cro. Car. 297. Mod. Cases 250. &c. 6 Co. 8. Plowd. 34. Dyer 201. 3 D. 367. p. 1. S. C. Comb. 264, 322. 4 Mod. 403. 3 Saik. 149. Cases B. R. 77. Holt 307. 1 Roll. Abr. 913. Dyer 322. (al. in marg.) 2 Ld. Raym. 973. Mod. Ca. 126. Str. 212. 1 Comyns' Dig. Admin. B. 13. 3d Ed. pa. 344.

WILLIAMS the executor of J. S. brought case against Carey the sheriff, for that his testator having recovered judgment in debt against A. sued out a *fieri facias*, whereon the defendant returned, he had levied 19 l. 5 s. 4 d. and that he had taken other goods to the value of 40 s. which remained in his hands *pro defectu emptorum*, and that A. had no other goods, *ubi revera* the sheriff had levied the whole debt, and averred that afterwards A. became poor, and unable to satisfy the residue of the debt. Verdict *pro quer.* It was objected in arrest of judgment, that this was a personal tort, and not within 4 E. 3. c. 7. *Sed Cur. contra.* There is a great difference between mesne process, as the case in *Jones* 173. *Noy* 87. *Latch* 167. *Poph.* 187. and this case, which is a process in execution; for by levying of the goods a right was vested in the testator. Judgment *pro quer.*

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Vide Record,
Page 724.

3. Hicks *versus* Downling.

[Mich. 8 Will. 3. B. R. Intratur Hill. 7 W. 3. Rot. 697. 1 Ld. Raym. 99. S. C.]

Lessee makes assignment, assignee burns the house by negligence, lessee cannot have action: otherwise in the case of an under-lease. V. 1 Cro. 187. Post 19. Plaintiff in such action must have a residuary interest. 1 Brown. Ent. 29. Cro. El. 777, 784. 5 Co. 13. b. 5 Lev. 359. Cases B. R. 100. S. C.

PLAINTIFF declares he was possessed of a messuage for a term of years *ad tunc & adhuc venturo*, and being so possessed, demised it to the defendant for three years, *virtute cujus* the defendant entered, and being so possessed, *reversione inde eidem quer. spectan.* so negligently kept his fire that the house was burnt down; and verdict *pro quer.* Moved in arrest of judgment, that though the plaintiff had a term *ad tunc & adhuc venturum*, yet that might not be so long a term as the term of the under-lessee, for three years, and this action lies not without a residuary interest; by which means he is liable over to him that has the inheritance: The Court allowed that, but thought it appeared here was a residuary interest, it being laid to be an under-lease, and not an assignment with these words *reversione inde eidem quer. spectan.*

4. Tubervil *versus* Stamp.

[Mich. 9 Will. 3. B. R. Intratur Trin. 9 W. 3. Rot. 359.
1 Ld. Raym. 264. S. C.]

Vide Record,
page 726. Co.
myas 32. S. C.

CASE on the custom of the realm *quare negligenter custodivit ignem suum in clauso suo, ita quod per flammam BLADA quer. in quodam clauso ipsius quer. combusta fuerunt.* After verdict *pro quer.* it was objected, the custom extends only to fire in his house, or curtilage, (like goods of guests,) which are in his power. *Non alloc.* For the fire in his field is his fire as well as that in his house; he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shewed it. And *Holt, Rokeby, and Eyre* against the opinion of *Turton*, who went upon the difference between fire in an house which is in a man's custody and power, and fire in a field which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment according to the opinion of the other three (a).

Carth. 425.
Case for negligent keeping his fire in clauso suo, per quod it burnt the corn in another's close, gift. Bruera & jumpna. Post. 19. 647. 2 H. 4. 18. 14 Aff. pl. 9. Fitz. Abr. tit. Issue, pl. 83. Double Plea 31. 28 H. 6, 7. Old Entr. 219. Rast. Ent. 8. Comb. 459. S. C. Skin. 631. Cafes B.R. 151. Holt 9.

(a) By 6th *Anne*, c. 3. no action shall be maintained against any in whose house or chamber any fire shall accidentally begin.—*Quere.* Whether this case is within the operation of the act?

5. Savil *versus* Roberts.

[Mich. 10 W. 3. B. R. Intr. Trin. 9 W. 3. Rot. 724. 1 Ld. Raym. 374. S. C.]

DECLARES *quod defendens falso & malitiose absque aliqua probabili causa ipsum indictari causavit de rioto, cui indictmento ipse placitabat non culp. & fuit inde per veredict. Furatorum acquietatus; per quod magnas denariorum summas & multos labores expendere & subire coactus fuit:* Upon *non culp.* the plaintiff had a verdict and judgment in *C. B.* which was now affirmed in *B. R.* It was objected that this would discourage prosecutions; and at this rate the prosecutor, whenever he is in the wrong, or miscarries, will be subject to an action. *Et per Cur.*

Action for maliciously causing him to be indicted of a riot after acquittal by verdict. Carth. 416. 2 Mod. 306. 2 Shower, Dir. on ver. Thompson. 1 Lev. 43. 1 Saund. 228. 6 Mod. 30, 169, 261. 3 Salk. 16. 349, 394, 405.

Cases B. R. 208. Holt 150, 193. 5 Mod. 223,

1. A civil action differs very far from an indictment. For in that the defendant has his costs, and at common law the plaintiff was amerced *pro falso clamore*, for the estreats

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Amerciaments pro falso clamore were affected by

jury upon warrants to the coroners. 8 Co. 38, 39. 11 Co. 43, 44. 1 Inst. 126, 127.

Bringing an action not actionable though nothing due, without some special collateral act of wrong, which must be expressly shewn. 9 Co. 56. b. 1 Roll. Abr. 112. 1 Jo. 94. Post. 15. pl. 6. 1 Vent. 12. Palm. 315.

If one not concerned procure A. to sue B. without cause, B. may have an action against him. 1 Roll. Abr. 43, 115.

estreats of which americiaments, warrants were constantly delivered to the coroners, who by a jury assented them according to the malice or vexation of the plaintiff. Also in civil actions the plaintiff asserts a right, or complains of an injury, and therefore the Court held, That to say *A. is a bastard, and I am the heir*, is not actionable; because he is a party concerned and asserts a right. *Aliter*, if he had not added, *and I am the heir*. *Vide 4 Co.* So to bring an action, though there be no good ground, is not actionable, because it is a claim of right, and he has found pledges, and is amerlicable *pro falso clamore*, and is liable to costs; but yet if one has a cause of action to a small sum, and take out a *latitat* to a very great sum, or has no cause of action at all, and yet maliciously sues the plaintiff to the intent to imprison him for want of bail, or do him some special prejudice, an action of the case lies; but then it is not enough to declare generally, that he brought an action against him *ex malitia & sine causa, per quod* he put him to great charge, &c. but he must shew the grievance specially, as in 1 Sid. 424, *sc.* whereas he owed the defendant 100 *l.* he sued him for 500 *l.* and to hinder him from bail affirmed to the sheriff 500 *l.* was due, *per quod* he was imprisoned for want of bail; or 1 Saund. 228. for that the defendant intending to procure his imprisonment, where there was no cause of action, or without any cause of action, sued him in an action for 300 *l.* whereupon he was arrested and imprisoned, &c. And yet if one that is not concerned, as a stranger, procure another to sue me causelessly, I may maintain an action against him generally. *Vide N. B. 98. m. 2 Inst. 544. 3 Cro. 378.*

Raym. 180. 1 Vent. 23, 25. 2 Cro. 32. 1 Jones 98. 1 Mod. 51. 1 Ro. Ab. 112. Action will lie for maliciously causing H. to be indicted, whereby he is damned, either 1. in person, as by imprisonment; 2. in reputation, as by scandal; 3. in property, as by expence. In the two first cases, though indictment be insufficient or ignominious returned, but not in the last.

1 Sid. 15, 424. F. N. B. 114, 115. Yelv. 46.

2. If a man be falsely and maliciously indicted of any crime that may prejudice his fame and reputation, he may bring his action, for he is falsely scandalized by the malice of the prosecutor, and this is a damage for which the law gives an action. 1 Sid. 15. Yel. 46. Lut. 122. So if a man be falsely and maliciously indicted of a crime that subjects him to peril of life or liberty, and for which he may be punished, he may bring his action, for he is endangered in this respect, and receives a damage, for which the law gives an action. So if a man be falsely and maliciously indicted, though it neither touch his fame nor liberty; for it is injurious to his property in putting him to a needless expence, and a damage to one's property will maintain an action as well as a damage to his fame or person. *Vide 3 E. 3. 19. 3 Aff. 1. 7 H. 4. 31. 11 H. 7. 25, 26. N. Br. 106. Sty. 379. Smith v. Hickson, 2 Str. 977.*

3. Where a man is falsely and maliciously indicted of a crime, which hurts his fame, and which is a scandal to him,

him, though the indictment be insufficient, or an *ignoramus* found, yet an action lies for the slander; because the mischief of that is effected. So it is if it endangered his liberty, and he was actually imprisoned. * Otherwise where it only concerns his property, for he cannot suffer in that in either of those cases.

Raym. 176, 180,
1 Mod. 4.
1 Lev. 275.
3 Lev. 210.
1 Vent. 12, 18.
&c. 2 Keb. 473,
476, 497, 546.

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But though the action lies, yet it is not to be favoured; and therefore, 1st, If the indictment be found by the grand jury, the defendant shall not be obliged to shew a probable cause; but it shall lie on the plaintiff's side to prove an express rancour and malice. 2dly, If *ignoramus* be returned, where indictment contains no scandal, or the party has not been imprisoned, no action lies; otherwise if it contains scandal, or the party has been imprisoned, but then there must be evidence of express rancour and malice; for innocence is not sufficient. Judgment affirmed.

Raym. 135. N. B. In an action on the case for maliciously procuring H. to be indicted for exercising the trade of a badger without licence, per quod he was put to great expence; (in which it was agreed that the indictment was insufficient). It

was resolved by Parker C. J. and the whole Court, upon great consideration, that there was no reason for this diversity between a malicious prosecution upon a good indictment, and upon a bad one; and that this action will lie as well for damage by expence, as by scandal or imprisonment, though the indictment be insufficient. Hill. 12 Ann. B. R. Jones vers. Givin. Gibb. Rep. 185. Intr. 11 Ann. Rot. 326. Style 451. 2 Keb. 547. 1 Vent. 86. Vide 6 Mod. 25, 73, 137, 169, 216. 5 Mod. 405. 2 Mod. 52. 1 Lev. 275, 292. 1 Stran. 692. Chambers v. Robinson. 10 Mod. 209. Rep. Temp Hard. B. R. 56. Doug. 205. 2 T. R. 225. 4 T. R. 247. 1 T. R. 518.

6. Robins *versus* Robins.

Vide Record, page 718.

[11 Will. 3. B. R. Intratur Trin. 10 Will. 3. Rot. 162.
1 Ld. Raym. 503. S. C.]

CASE, for that the defendant *colore cujusdam medii process. in lege* caused him to be arrested, and though he offered a common appearance held him to bail, where by law no bail was required; and verdict *pro quer.* on *non culp.* *Et per Holt C. J.* This is a tender action. You must shew that the plaintiff being indebted to the defendant in so much, the defendant took out such a writ for so much more, on purpose to hold him to bail: How else can it appear to us whether and how far he might be held to bail in that action? And as to what *Cartbew* said, that the writ was seldom returned, and they could not have it to give in evidence, and therefore it would be inconvenient to set it out specially in the declaration; the Chief Justice answered, He might have a rule on the officer to return his writ. *Vide 1 Saund. 228.* And this action lies not till the original action is determined (a).

Case for malicious holding to bail; declaration ought to set forth the sum due, and the process specially, and that the first action is determined. 2 Willson 376. 6 Mod. 262. Hob. 267. Yelv. 117. 1 Stra. 114. 2 Salk. 456. 5 Mod. 123, 224. 1 Lev. 169. Cases B. R. 273. S. C.

(a) *R. ac. Comyns' Reports* 190. *Vide 2 Wils. 305.* 3 *Term Reports* Doug. 215. 2 *Term Reports* 225. 183.

Vide Record,
page 730.

7. Iveson *versus* Moore.

[Trin. 11 Will. 3. B. R. Intrator Hill. 9 Will. 3. Rot. 437.
Comyns 58. S. C. 1 Ld. Raym. 486. S. C.]

Case for stopping
up a highway
leading to the
plaintiff's col-
liery with intent
to deprive him
of the profit
thereof, per
quod he lost the
profit, &c. and
his coals were
spoiled for want
of buyers. Court
divided whether
action lies or not.
Carth. 451.

Mod. Cases, &c.

353. Comb. 480. S. C. Holt 10.

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No action lies
for a public nu-
sance without
special damage.
1 Rol. Abr. 88.
N. 1.

Br. tit. Nu-
sance 1. Br.
Action sur Case
6. Godb. 343.
1 Cro. 510.
1 Leon. 206.
Allen 22. 1 Vent.
113. Hob. 284.

No man can
have action
without a parti-
cular injury or a
particular right.
2 Cro. 446.

CASE, and declared that he was possessed of a colliery, and that there was a highway near, by which he used to carry his coals, and that he had a certain quantity of coals dug ready for sale, and that the defendant dug a colliery near his, and intending to draw away his customers, and deprive him of the profit of his colliery, stopped up the said way, so as carts and carriages could not come to his colliery, *per quod per totum tempus predicti. proficuum carbonarie sue predicti. totalit. perdidit & carbones * sui predicti. pro defectu emptorum ex causa predicti. magnopere deteriorat. & depreciat: devenerunt. Non cul. and verdict pro quer.*

All the Court agreed, That where an action arises from a public nuisance, there must be a special damage, for he that did the nuisance is punishable at the suit of the public; and to allow all private persons their actions, without special damage, would create an infinite and endless multiplicity of suits.

Et per Tourton and Gould: Here is a special damage, and well enough set forth; for all have not coal-pits, and the matter subsequent to the *per quod* is not traversable. *Vide 1 Rol. 89. Goldsb. 146. † 1 Leon. 236. 1 Rol. 63. pl. 31. 1 Co. 51. 2 Jo. 146. 156. a strong case.* To shew a special damage, it is sufficient to say, *per quod servitium*, for such a time, *amissit*, *Hob. 284. crexit ad nocumet. liberi tenementi sui. 9 Co. 53. per quod commun. habere non potest in tam amplo modo & forma.* And the damage does not consist in a single instance, as *per quod maritagium amissit*, which may be shewn; but *in casu principali* it would be infinite.

Rokeby and Holt C. J. contra. The plaintiff's near situation yields him a convenience, but no right; for it is the king's highway, for the equal use and benefit of all his subjects; and the plaintiff has no more, nor no better right than any body else: And they held, a man could not have a particular action without a particular injury or a particular right, which are the grounds upon which all actions are founded, and to which they must conform. *Vid. 2 Saund. 115. 3 Cro. 664.* This plaintiff had nei-

† *Holt C. J. and Rokeby J. denied this case of 1 Leon. 236. to be law.*

ther

ther a particular right in this way, nor a particular injury. For the stoppage is common to every one as well as to him; and an indictment would lay it *ad nocumentum omnium subditorum per viam illam transeun.* And the cases cited on the other side were founded on a particular right—as *case* for a stoppage where one has a way, a water-course or common to his house, mill, or tenement, there the action is founded on a particular right, and lies without the *per quod*.

They held, that supposing here was a particular injury by special damage, that special damage is not sufficiently set forth; for it is not sufficient to say, he lost customers, or buyers could not come, without shewing buyers were coming, and were hindered. *Vide* 2 Lev. 214, 223. and the case in 1 Rol. 63. has been often denied, and is not law; for the damage must be specially shewn, where the words themselves are not actionable. 1 Rol. 58. n. 1. 1 Cro. 140. 1 Rol. 34, 35, 36. must shew who refused. And the Chief Justice cited the case of *Paine and Partridge*, 2 W. & M. in this court. *Case* for not keeping of a ferry-boat, which was for all the king's people paying a toll, but *gratis* for the inhabitants of such a village, of which the plaintiff was one. In this case the Court held the custom to be good, but that the action did not lie; for though the plaintiff has a particular right, yet that consists in being exempt from toll, and not in passing, which is common to all. So that the not keeping the ferry is a public nuisance, for which the plaintiff cannot maintain an action more than any other person. But the defendant must be indicted. *Vide* 2 Bl. Com. 219. 2 Wilf. 58. Bull. N. P. 78. Bur. 2424.

The Court being thus divided, and there being a former rule to stay judgment, no judgment could be entered. *Et per Cur.* If the Court had been divided on the first motion, the plaintiff might have entered judgment; but now this rule must stand or be discharged, and discharged it cannot be (a), because the Court is equally divided (b).

If the action lay, the plaintiff could not have judgment, because no rule could be made to discharge the first rule.

(a) 1 Ld. Raym. 271. 3 Mod. 156.

(b) It appears at the end of the report of this case, in 12 Mod. 262. that in the case of *Philips and Ryand*, E. 11 G. 1. the Chief Justice said that judgment was reversed by the opinion of all the Judges in the Exchequer-Cham-

ber; but at the end of the report in Ld. Raym. it is stated that the case was argued before all the Justices of the Common Pleas and Barons of the Exchequer at Serjeants Inn, and they were all of opinion for the plaintiff that the action well lay.

1 Inst. 56. a.
1 Rol. Abr. 36,
63.

Not sufficient to shew in general that customers could not come, but must shew specially that customers were coming and were hindered. Ant. 12. 2 Cro. 446. Vaugh. 335. 2 Rep. 79. 2 Roll. Ab. 56. 2 Saund. 115. Carth. 191.

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8. Lane *versus* Cotton & al.

[Pasch. 12 Will. 3. B. R. Intratur Pasch. 10 Will. 3. Rot. 403. 1 Ld. Raym. 646. Comyns 100.]

Case against the postmasters-general for Exchequer bills lost out of a letter delivered at the post office at London. Vide the entry in this case. 2 Mod. Intr. 108. Post. 143. S. C. 5 Mod. 445. Carth. 487. Rep. A. Q. 12. Cases B. R. 472. Holt 582.

SIR Robert Cotton and Sir Thomas Frankland were constituted postmasters-general by letters patent, according to the stat. 12 C. 2. 35. for erecting the post-office; and in the patent there was a power to make deputies, and appoint servants at their will and pleasure, and to take security of them in the name and to the use of the king; and also that the defendants should obey such orders as from time to time should come from the king, and as to the revenue should obey the orders of the Treasury. Farther, the king grants to them that they should not be chargeable for their officers, but only for their own voluntary default or misbehaviour; and this is granted with a fee of 1500*l.* per annum. The plaintiff Lane, having Exchequer bills, inclosed them in a letter directed to one Jones at Worcester, and delivered it at the post-office at London into the hands of one Breeze, who was appointed by the defendants to receive the letters, and had a salary. The letter was opened in the office by a person unknown, and the Exchequer-bills taken away; and for this an action of the case was brought against the defendants, and on the general issue, the special matter found as is above mentioned.

Adjudged that the action lies not, per three judges contra Holt, C. J.

Turton, Gould, and Perwys held the action lay not. 1. Because the office is for intelligence, and not for insurance. 2. Because Breeze is an officer, and he is liable. 3. It is impossible the postmaster-general, who is to execute this office in such distant places, at home and abroad, and at all times, by so many several hands, should be able to secure every thing. 4. Because Exchequer-bills are new things, and this office is not a conveyance for treasure.

Holt, C. J. *contra*. He considered this as a letter lost in the office, and not upon the road; and held the postmaster-general was liable, because the care of the whole is committed to him, and the rest are but his deputies: For, first, the law makes the officer, whoever he be, responsible of consequence both for himself and his deputy, as the marshal or warden for a prisoner, or the sheriff for goods taken in execution, for which he is liable upon an *extendi facias* on the statute, as well as a *levari facias*, which is at common law; or for a prisoner in execution in debt, which is by the stat. of the 25 E. 3. c. 17. as well as in trespass *vi & armis*, which is an execution at common law: And this shews that the officer is in consequence liable, whether he become entrusted by common law

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Officer responsible both for himself and deputy, whether his trust arise by common law or by statute. Hard. 53. 1 Mod. Sid. 71. Innkeeper, carriers, &c. taking reward

law or by statute: And there is no need of a contract, for the law makes him answerable. 2dly, He has a reward, which is the reason in the case of innkeepers, hoymen, &c. who are bound to keep safely, and answer all neglects of those that act under them, and so they would be, though they should expressly caution against it. And this case is within the same reason with those cases that make men responsible for negligent keeping, viz. that if they could not be charged without assigning a particular neglect, they might cheat any man living, and it would not be in his power to prove it. It is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he should never be able to prove it. It would be hard in this case to put the plaintiff to prove a particular neglect amongst such a multitude of under-officers; ergo the postmaster is charged with it.

3dly, Exchequer-bills are proper to be sent this way; for the words are general, *any packets whatsoever*, and their being new things is no argument against it; for new things may be governed by old laws, when they fall within the reason of those things which were the subject-matter of those laws at first. Also, when a man takes upon himself a public employment, he is bound to serve the public as far as his employment goes, or an action lies against him for refusing. Thus, If a farrier refuse to shoe a horse, an innkeeper to receive a guest, a carrier to carry, when they may do it, an action lies; their understanding is in proportion to their power and convenience. Dy. 158.

3dly, If without this act, or before it, any person had voluntarily set up such a post-office, that person had been liable to an action; and consequently so is the postmaster; for all other people are excluded: The nature of the office is the same, and he is in on the same terms.

4thly, Though the master be liable, yet *Breeze* is chargeable also; but he is not chargeable as an officer, but as a wrong-doer. It is upon this reason that an action lies against the gaoler as well as against the sheriff, for a voluntary escape; for it is in the nature of a rescue: But for a negligent escape, the action lies only against the sheriff. *Vide 1 Leo. 146. 3 Cro. 175. 743. 1 Ro. Rep. 78.* Ill reported, *Noy 90.*

5thly, What is done by the deputy is done by the principal, and it is the act of the principal, who may displace him at pleasure, * even though he were constituted for life. *Vide Hob. 13. Mo. 856.* And the act of the deputy may forfeit the office of his principal. 39 *H. 6. 34.*

6thly, The king's discharge may be good against the king as to his revenues, but not as to the subject; for it cannot

answerable for neglects of those that act under them. 1 Will. son 281. Co. Lit. 89. F.N.B. 93. Fitts. Abr. Process 35. Bro. Action on the Case, pl. 67. 1 Roll. Rep. 63. Moor 135. 1 Com. Dig. (3Ed.) 239. Action on the case for deceit. B.

4 Co. 4. a. b. New things may be within old laws, when they fall within the reason of those things which were originally the subject-matter of those laws. Whoever takes a public employment, is bound to serve the public as far as that extends. PoR 441.

Deputy is chargeable as a wrong-doer. 2 Cro. 330. Hob. 11. Molloy 209. 3 Lev. 258. 3 Mod. 321. Moor 462.

Act of deputy may forfeit office of principal, because quasi his act. 2 Lev. 69. 1 Vent. 190. Raym. 220. 1 Mod. 85.

* [19]

cannot hinder him of a remedy the law gives him. Judgment *pro def.* (a).

(a) *Vide Whitfield v. Lord Le Despencer & al. Cowper 754.* where the same point is decided accordingly; but it is held that the postmaster and all inferior officers are responsible for their own personal negligence.

9. Pantam *versus* Isham.

[Pas. 13 Will. 3. B. R.]

3 Lev. 359. S. C. by the name of Pantam against Isham. Case for negligently keeping his fire, per quod, &c. It lies not against lessee at will by lessor seized in fee; otherwise by lessor, termor for years, or a stranger. Ante 13. Tubervil *versus* Stamp. 5 Co. 13. b. 1 Roll. Abr. 1, s. 454, 458. 2 Rol. 566, 10. 5 Co. 13. b. Cro. El. 777, 784, 10. 1 D. 11. p. 1. S. C.

CASE: The jury found that the plaintiff being seized in fee of six stables, let one to the defendant at will, and the rest to other persons for a term of years yet enduring; that the defendant kept his fire so negligently, that it burned the plaintiff's stable, and also the defendant's, and the other five stables. It was agreed, that if one seized of an house in fee, make a lease at will, and lessee negligently burns the house, no action lies; for he had it in his power to secure himself by covenant: *Secus*, if lessee for years make a lease at will, not but that he might secure himself by covenant, but because he is answerable over to his lessor, in that respect he shall have an action on the case.

Also the Court held, No action lay against the defendant for the stable he took, if the fire had ceased there; but if it goes on, and burns his next neighbour's, he shall have an action for his loss, because he is a stranger, and had it not in his power to make him covenant to be careful; and by consequence so may the tenants of the other houses.

Lastly, That the lessor might bring actions against the other lessees, and so might they against lessee at will; and as the lessor might sue the other tenants, and they sue tenant at will, the lessor should have his election. *Vide* 3 Lev. 358.

10. Ashby *versus* White & al.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 938. S. C.]

Med. Cases 45. S. C. Case by a burgess against constables of a borough for refusing to receive his vote in election of members to parliament. Held that it lies not, by three judges, against Holt C. J. 3 Salk. 17. Holt 324. 8 S. C. 89.

ACTION upon the case against the constables of *Aylebury*, and declares that the king's writ issued and was delivered to the sheriff of *Bucks* for election of knights of the shire and burgesses of boroughs, to serve in parliament; whereupon the sheriff made out his precept to the defendants, being constables of *Aylebury*, for the election of two burgesses for that borough, which was delivered, and the burgesses duly assembled to choose, &c. and that the plaintiff being duly qualified, &c. offered to give his voice for Sir *T. Lee*, and *S. Mayne*, Esq. but the defendants obstructed him from voting, and refused and would

would not receive his vote, nor allow it. Upon not guilty, a verdict was found for the plaintiff, and, after motion in arrest of judgment, the Court gave their opinions *seriatim*.

Gould J. was of opinion for the defendants, that the action was not maintainable, because the constable acted as a judge, and not as an officer, and that in a parliamentary matter. Also, because the hindering of a vote is *damnum absque injuria*. 9 *H.* 6. 60. 2 *Lev.* 114. 19. *H.* 6. 44. *Hob.* 267. Farther, he held it would beget multiplicity of actions, (*Vide 5 Co. Williams's case*,) and that this was out of time. It ought at least to follow and not to precede the adjudication of the House of Commons. 2 *Gro.* 368. The reason of *Stirling's* case was because the refusal of a poll occasioned the loss of the place of bridge-master, which was a real profit: And the case of an action by a freeman for refusing to admit his voice in the election of a Lord Mayor was, because he had no other remedy but this action; but this differs. *Vide 2 Lev.* 50. 2 *Vent.* 50. 2 *Lev.* 250.

Powys J. ad idem, That the defendant, though not properly a judge, is *quasi* a judge; that when the matter comes before the House of Commons, the plaintiff's vote will be allowed; and therefore he does not lose his privilege; *de minimis non curat lex*, and this injury, if it be one, comes within that rule; and he mentioned the 7 & 8 *W.* 3. which gives an action for a double return, to the candidate; and that before the statute 23 *H.* 6. the candidate had no action for a false return; and that in 1641, there were seventy double returns, and yet no action brought, or act made; and from those statutes giving new actions in those cases, he inferred no action lay for the voter at common law. Farther, the judgment here will not bind the Commons, nor be evidence there; for the Commons are not bound by our determinations; and, lastly, *Omnis innovatio plus novitate perturbat quam utilitate predest.* 1 *Bul.* 138.

Powell J. differed from *Gould* and *Powys*, the one holding him judge, the other *quasi* a judge, for he must be a judge or not a judge, and there is not any medium: That here he is an officer; as such he is to execute the king's writ, and has nothing but a ministerial power. In other matters *Powell* agreed with the other two, urging that the right of election of members must depend upon the right of the electors; and the former the parliament are to decide, and the plaintiff may petition the parliament to determine it; and after that may have his action, but not before; and therefore was not without remedy.

Holt C. J. contra. He held that the plaintiff had a right to vote; that a freholder has a right to vote by reason of his

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Polluxf. 470.
5 *Mod.* 311.
Far. 43. 6 *Mod.*
45. *Plowd.* 120.
2 *Sid.* 168.
2 *Salk.* 502, 504.
1 *Vent.* 206.
2 *Vent.* 25. 2 *Lev.*
86, 114. 6 *Mod.*
45. 2 *Bull.* 265.
3 *Lev.* 29.
Lutw. 88.

Right of elec-
tion of members
of parliament is

either 1. Real, viz. *ratione liberi tenementi*, in counties, and *ratione burgagii*, in ancient boroughs; or 2. Personal, viz. *ratione franchise*, in corporations.

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Where there is a right there is a remedy. If statute gives a right, common law will give a remedy.

Where a parliamentary matter comes in by way of incident to an action, the king's court must determine it.

6 Mod. 45, 49.
2 Salk. 503.
2 Roll. Rep. 311.
Cro. Jac. 478.
Co. Lit. 56. a.

1 Bro. P. C. 47.

his freehold, and it is a real right; and the value of his freehold was not material, till 8 H. 6. c. 7. which requires it should be 40 s. *per annum*; that in boroughs they have a right to vote *ratione burgagii*: And that in cities and corporations it is a personal inheritance, and vested in the whole corporation, but to be used and exercised by the particular members, and that such a franchise cannot be granted but to a corporation. *Hob. 14. 12 Co. 120. Mo. 812.* And this is not a *minimum in lege*, but a noble privilege, which entitles the subject to a share in the government and legislature: No laws can be made to affect him or his property but by his own consent, given in person if he be chosen, or by his representative if he is a voter: That if the plaintiff has a right, he must in consequence have a remedy to vindicate that right; for want of right and want of remedy is the same thing. If a statute gives a right, the common law will give a remedy to maintain that right; *à fortiori*, where the common law gives a right, it gives a remedy to assert it. This is an injury, and every injury imports a damage. Violating the right of another by a scandalous word is sufficient damage to give an action, though the party suffers not a farthing, and the pecuniary loss be nothing. Where parliamentary matters come before us, as incident to a cause of action on the property of the subject, which we in duty must determine, though the incident matter be parliamentary, we must not be deterred, but are bound by our oaths to determine it. There can be no such method by petition as my brother *Powell* speaks of; nor can the parliament judge of this injury, nor give damages to the plaintiff for it. But judgment was given for the defendant. *Note*: On Friday the 14th of January 1703, this judgment was reversed in the House of Lords. *Trevor C. J. and Price and sixteen Lords* concurred with the three judges of *B. R.* The rest of the judges and fifty Lords concurred with *Holt C. J.* Although this matter relates to the parliament, yet it is an injury precedent to the parliament, as my Lord *Hale* said in the cause of *Barnardiston versus Soame*.

Vide Record,
page 767.

II. *Goddard versus Smith.*

[Mich. 3 Ann. B. R.]

2 Salk. 456.
S. C. Case for a malicious indictment under *legitimo modo tuit acquietatus*. Evidence of a *nolle prosequi* not sufficient to maintain this

CASE, for a false and malicious indictment of barrettry, whereof he was *legitimo modo acquietatus*, and upon the trial it appeared he was acquitted no otherwise than by entry of a *nolle prosequi*; and whether this was sufficient to maintain the action was made a point for the opinion of the Court: And the Court held, this evidence did not support the declaration; for the *nolle prosequi* is a discharge.

Action sur le Cafe, sur Assumpsit.

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discharge as to the indictment, but is no acquittal of the crime. And the Chief Justice doubted as to the latter matter, and was of opinion, that the Crown, notwithstanding the *nolle prosequi*, might award new process upon the same indictment.

declaration.
Nolle prosequi is no discharge of the crime, but of the indictment. Mod. Cases 161. Hard.

83. Post. 456. 6 Mod. 95, 261, 262. 11 Co. 65, 66. 1 Sid. 420. 1 Vent. 32. 5 Mod. 208. Hard. 126, 153.

12. Tenant *versus* Golding.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1089. S. C.]

Vide Record,
page 770.

THE plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, which the defendant *debuit* & *solebat reparare*; and that for want of repair the filth of the privy ran into his cellar, &c. Judgment by default; and after a writ of inquiry it was moved in arrest of judgment, that this being a charge laid upon the owner himself, the plaintiff should have shewed a title by prescription; *sed non allocatur*, for it is a charge laid on the defendant of common right, which by law he is subject to. As one is bound to keep his cattle from trespassing on his neighbour's ground, so he must a heap of dung, if he erects it. *Sic utere tuo ut alienum non ledas*.

Post. 360. S. C. 6 Mod. 311. Holt 500. in both places called Tenant *ver. Goldwin*; sic in Ld. Raym.

* [22]
Case for not repairing the partition-wall of defendant's privy, pro defectu of which, the filth ran into the plaintiff's cellar. Gift. Where the charge is up-

on the defendant of common right, the plaintiff need not prescribe in his declaration. Cro. Car. 500. 3 Lev. 266, 133. Palm. 290. 9 Co. 57.

Action sur le Cafe, sur Assumpsit.

I. Sexton *versus* Miles.

[1 W. & M. C. B.]

IN *assumpsit*, the plaintiff declared, that in consideration, &c. the plaintiff would deliver unto the defendant, &c. the defendant promised to pay, &c. and *in facto dicit*, that he did deliver, but does not allege a place where; the defendant demurred for want of a venue, and the declaration was held ill, for a consideration executory is traversable.

Consideration executory is traversable: Ergo a venue must be laid. 3 Lev. 311. 2 Lev. 227. 1 Show. 50. S. C.

2. Tomkins *versus* Bernet.

[Hill. 5 Will. 3. 1693. *At Nisi prius in London, coram Treby Chief Justice (a).*]

Indebitatus assumpsit for money received to plaintiff's use, evidence, payment by an obligor upon an usurious bond, and held not maintainable in debitus assumpsit lies for money paid by mistake or deceit, but not for money paid knowingly on illegal consideration. 2 Lev. 3, 17, 153. 1 Lev. 164, 5, 273. Mod. Cases 77. Skin. 411. S. C. 2 Bur. 1005. Vi. 1 T. R. 286.

THREE were bound in an usurious obligation; one of them paid some part of the money, and afterwards the obligee brought debt against another of the obligors, who pleaded the statute of usury, and avoided the bond: And now the obligor, that had paid some part of the money without cause to the obligee, brought an *indebitatus assumpsit* against him to recover back that money; Treby C. J. allowed, That where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, it is reasonable he should have his money again; but where one knowingly pays money upon an illegal consideration, the party that receives it ought to be punished for his offence; and the party that pays it is *particeps criminis*, and there is no reason that he should have his money again; for he parted with it freely, and *volenti non fit injuria*. This case was cited: One, bound in a policy of assurance, believing the ship to be lost, when it was not, paid his money; and it was held he might bring an *assumpsit* for the money: One was employed as a solicitor, and had money given him to bribe the custom-house officers, and he laid out the money accordingly; *assumpsit* was brought against the solicitor for this money, and held it lay not.

(a) In *Clark v. Shee & another, Cowp.* 200. Lord Mansfield says, this case has been long exploded. In *Smith v. Bromley, Doug.* (3 edit.) 697. Ld. Mansfield says, that this case has been often mentioned, and he had often had occasion to look into it; but it is so loosely reported, and stuffed with such strange arguments, that it is difficult to make any thing of it. He thinks the judgment may have been right; but the reporter, not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as he takes it, an action to recover back what had been paid in part of principal and legal interest upon an usurious contract, and therefore the action would not lie. So far as principal and legal interest went, the debtor was obliged in natural justice to pay, therefore he could not recover it back: But

for all above legal interest, equity will assist the debtor if not paid, or an action will lie to recover back the surplus if the whole has been paid. The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and therefore the man who, from mere necessity, pays more than the other can in justice demand, and who is called in some books the slave of the lender, shall be said to pay it willingly, and the lender shall retain, though it is in order to prevent this oppression, and advantage taken of the necessity of others, that the law has made it penal for him to take. This kind of reasoning is equally applicable to the case of a bailiff who takes garnish-money from his prisoner. It is wrong for the bailiff to take it, and it is therefore wrong for the other to tempt him, and *volenti, &c.* and therefore

fore he shall not recover it back ; but this has been determined otherwise. The case of money given to a solicitor to bribe a custom-house officer, cited in *Tomkins and Bernet*, is against his own agent, and therefore he cannot reco-

ver. This case is likewise held of no authority, and many instances are shewn of contrary determinations, 1 *Bro. Cb.* 547. *Vide also Str.* 915. 2 *Bur.* 1005. 1 *T. R.* 286.

3. Hard's Case.

[Hill. 8 Will. 3. B. R.]

[23]

INDEBITATUS *assumpsit* will lie in no case but where debt lies (a), therefore it lies not upon a wager, nor upon a mutual *assumpsit*, nor against the acceptor of a bill of exchange ; for his acceptance is but a collateral engagement. But it lies against the drawer himself, for he was really a debtor by the receipt of the money, and debt would lie against him.

Indebitatus assumpsit will lie in no case but where debt lies. *Hard.* 485. 1 *Mod.* 285. 1 *Lev.* 298. 1 *Roll. Abr.* 597. 2 *Keb.* 713, 758.

(a) In *Bovey v. Castlemain*, 1 *Ld. Raym.* 69. the general proposition in this case is expressly laid down and agreed to by the Court ; and although it may appear to be weakened by the opinion of Lord Mansfield in *Moses v. McFerlan*, 2 *Bur.* 1005, " that an action of *assumpsit* will lie in many cases where debt does lie, and in many where it does not," it is worthy of observation, that the learned judge does not

use the expression *INDEBITATUS assumpsit* ; and the above doctrine in *Hard's* case seems to be confirmed in *Walker v. Witter*. *Doug. Rep.* 1. where debt was held to lie on a foreign judgment, upon the ground that *INDEBITATUS assumpsit* would lie upon such a judgment ; and *Askeburst and Buller*, Justices, are there reported to have said, wherever *INDEBITATUS assumpsit* can be maintained, *debt* will lie.

4. [Hill. 9 Will. 3. *At Nisi Prius at Guildhall, coram Holt Chief Justice.*]

INDEBITATUS *assumpsit* *versus* A. and B. and judgment *versus* A. by default. B. pleaded payment, and issue thereupon. *Et per Holt.* No finding upon this issue can discharge A. for he has confessed the whole.

No finding can discharge a man against a confession by nient de dire. 1 *Saund.* 250. *Cro. El.* 701. *Comb.* 37.

5. Butcher *versus* Andrews.

[Will. 3. B. R.]

Vide Record,
page 732.

ASSUMPSIT, for that the defendant, in consideration that the plaintiff at his request would lend the defendant's son any sum of money, and let him have any goods, so as the money lent and goods sold exceeded not 5 *l.* promised to pay him ; and avers that he lent him 5 *l.* in money, and sold him goods upon credit to the value of 5 *l.* and declares also that the defendant was indebted to him for so much money *mutuo dat & accommodat*, to the son at the defendant's request, &c. Upon *non assumpsit*, verdict

Carth. 446. *Assumpsit* in consideration that at his request he would lend the defendant's son any sum, &c. not exceeding 5 *l.* Plaintiff avers that he lent a greater sum.

2 Roll. Abr. 32.
2 Vent. 153.
Indebitatus will
not lie against
B. for money
lent to A. at B's
request, because
the promise is
collateral only.
Raym. 67.
Cont. 1 Vent.
311. sed 2 Vent.
36. accord.
Farl. 12, 13.
2 Saund. 136.
2 Lev. 119.
Post. 25. Cro.
Jac. 500. Comb.
473. S. C.
3 Salk. 15.
Holt 213.
Dann. Abr.
1 pt. 27.

verdict *pro quer.* and 3 *l.* given in damages. Upon motion in arrest of judgment it was allowed, That the defendant could not be indebted for more than 5 *l.* for he engaged for no more; so that if the jury had given more, it had been naught. Here the jury having given less than 5 *l.* this was urged to have helped the declaration. *Sed non allocatur*; for first, *non constat* to the Court, but the defendant has paid 5 *l.* already, and that this is now claimed over and above. 2dly, That the declaration was naught; for the money being lent to J. S. the defendant cannot be obliged as for a debt, and liable to an *indebitatus*, but to a special *assumpsit*, as being but collaterally bound by his promise; for the same money cannot be lent to two, otherwise had the money been only delivered to the son at the father's request, or only had and received by the son at the father's request, for then the loan had been to the father; *quod nota* (a).

(a) *R. acc. 2 Wilf. 141. Vide 3 Wilf. 388. 2 Bl. Rep. 872.*

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Vide Record,
page 736.

6. Harrison *versus* Cage & ux.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 386. S. C. with other Points.]

Assumpsit in consideration, plaintiff promised to marry the defendant, she promised to marry him, lies for the man as well as for the woman, because mutual. 5 Mod. 411. S. C. Carth. 467. 2 Roll. Abr. 22, 77. 2 Bulst. 48. 3 Cro. 323. Car. Rep. Dickenfon *vers.* Holcroft. 6 Mod. 172. 1 Sid. 180. 1 Keb. 352. 3 Lev. 65. 2 Salk. 437, &c. Cases B. R. 214. Holt 456.

ASSUMPSIT, for that in consideration he had promised to marry the defendant, she promised to marry him; and verdict *pro quer.* Objected, that the woman may in such cases have an action, but the man cannot; because marriage is no advantage to the man, but to the woman it is. And the writ *Causa matrimonii prælocuti* lay for the woman, but not for the man. *Vide Ro. 22. pl. 2. 1 Inst. 204. F. N. B. 3. 205. Hob. 10. Sed non allocatur*: For marriage is a consideration on the man's side sufficient to raise an use; and a man shall have an action for scandalous words *per quod* he lost his marriage. *Et per Holt C. J.* The action is grounded upon the mutual promises: If the woman's promise does not bind, the man's promise is but *nudum pactum*, and therefore it is actionable either on both sides, or on neither side (b).

(b) The following points have been decided respecting promises of marriage. Where the promise of the man was proved, and no actual promise of the woman, evidence of her carrying herself as consenting and approving his promise, was held sufficient. *Hutton v. Mansell*, 3 Salk. 16. If an infant and a person of age mutually promise, the infant, although not bound,

may bring an action for breach of promise by the adult. *Holt v. Ward*. 2 Str. 850, 937. *Fitzgib.* 175, 275. Mutual promises to marry are not by the statute of frauds necessary to be in writing. *Cock v. Baker*. 1 Str. 34. Promise not to marry any body else, when there is not a mutual agreement of intermarriage, is not obligatory. *Lowe v. Peters*. 4 Burr. 2225.

7. Palmer *versus* Stavely.

[Pasch. 13 W. 3. B. R. Comyns 115. S. C. 1 Ld. Raym. 669. S. C.]

INDEBITATUS *assumpsit* for money had and received by the defendant for the plaintiff *ad usum* of the defendant, and verdict upon *non assumpsit* for the plaintiff. And, upon motion in arrest of judgment, the Court held, That these words, *ad usum* of the defendant, should be rejected, because they are insensible and repugnant, and then the promise was for money had and received by the defendant for the plaintiff, which is well. *Vide* 1 Sid. 306. 1 Mod. 42. 2 Keb. 615. 1 Rol. 15. l. 20. 1 Com. Dig. 3d edit. 216. *Action on the Case sur Assum. H. 3.*

Indebitatus *assumpsit* for money received by the defendant for the plaintiff *ad usum* defendant, held well after verdict. Mod. Cases 161, 309. Cases B. R. 510. S. C.

8. Cutting *versus* Williams.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 825. 11 Mod. 24.]

ASSUMPSIT, and two several counts laid; one was on a promissory note, and the plaintiff counted thereon as on a bill of exchange, upon the custom of merchants. On *non assumpsit*, entire damages were given, and judgment accordingly. Upon a writ of error brought in this Court, it was held, 1st, That the plaintiff could not declare upon the promissory note as upon a bill of exchange: and as there could be no such count or action, so there could be no such damages. 2dly, That they could not reverse the judgment in part, *viz.* as to the one count, and affirm as to the other; and denied *Jacob and Mills's* case. *Hob. 6. (a).* And took this difference, *viz.* Where the judgment is partly by the common law, and partly by statute, it may be reversed in part; for that which was a judgment at common law, will remain a judgment, and be complete without the other *(b).* *Vide* Cro. Car. 349. Cro. Jac. 424. Mo. 708. Aleyn. 74. 1 Rol. 775. 1 Keb. 232. 2 Keb. 506, 235. Sty. 121, 125. 1 Vent. 27, 39. 2 Saund. 179.

Assumpsit on promissory note upon the custom of merchants and held ill before the statute. Judgment cannot be reversed in part and affirmed in part, unless where part is by common law, and part by statute. 2 Danv. 457, &c. Cro. Car. 339. Cro. Jac. 343. Far. 152, 154. S. C. 1 Roll. Rep. 24. Allyn 75. Holt 273. Lilly Ent. 227. See Stat. 3 and 4 Ann. ch. 9.

(a) R. acc. Cart. 235.

(b) R. acc. Rep. B. R. temp. Hard. 50. Vid. Str. 973.

9. Meredith *versus* Short.

[25]

[Pas. 1 Ann. B. R. 2 Ld. Raym. 759. by the Name of Meredith *versus* Chute, S. C.]

ASSUMPSIT; declares, Whereas at the request of the defendant, he hath delivered to the defendant a note given him by J. S. a third person, for 50 l. the defendant

Far. 12. Assumpsit, in consideration of the delivery of a note under J. S.'s

hand for 50l. held a good consideration, because the note was evidence of a debt. Nelson's Lutw. 148.
 2 Saund. 136.
 2 Lev. 119.
 Palm. 171.
 1 Lev. 165.
 2 Salk. 125.
 Far. 13. Holt 34. S. C.

defendant in consideration thereof promised to pay him 50l. After verdict, moved in arrest of judgment, That it is not a gift but a delivery; and that the note was useless, and of no value, because it does not appear to be for a consideration. *Holt*, C. J. The delivery shall be intended absolute and indefinite, and it is evidence of a debt, and therefore the parting with it is a good consideration; and though the consideration of this note was proved at the trial, yet that was not necessary, as I conceive. *Vide* 3 Cro. 155, 170. *contra*. *Vide* St. 3 & 4 Ann. c. 9.

10. Gould *versus* Johnson.

[Pas. 1 Ann. B. R. 2 Ld. Raym. 838. S. C. with another Point 3 Ld. Raym. Entries 7.]

Post 422. S. C. Far. 143. called Booth and Johnson. Assumpsit, in consideration that the plaintiff would receive A. &c. into his house ut hospites, and find them meat, &c. Averred, that he did receive them, and find them meat, &c. held sufficient averment, without ut hospites; on demurrer. 1 Sid. 309. 3 Lev. 55. 6 Mod. 227, 259. Poph. 193. Yelv. 87. 1 Saund. 7. 6 Mod. 77. Post 29. pl. 30.

ASSUMPSIT; and declares on a promise, in consideration he would receive *A. B. and C.* into his house *ut hospites*, and find them meat, drink, and all necessities, to pay what was deserved; and says, That he did receive them into his house, and did find them meat, drink, and all necessities; and the defendant has not paid, &c. Defendant demurred, because it was not said he received them *ut hospites*, which is a special receiving, as innkeepers do; and that a precise performance was necessary. *Et per Holt & Cur.* This is a sufficient performance; for the receiving here mentioned, is receiving them *ut hospites*, and evidence of such reception would well prove them to be received *ut hospites*. And if they were received as servants, and not as guests, it should have been pleaded on the other side with a traverse of their being received *ut hospites*: A finding meat, drink, &c. is a guesting them, and must be so intended, till the contrary be shewed. These cases were cited on the other side, and answered. 2 Cro. 45. *Jones* 441. 2 Co. 245. *Yelv.* 175. (a).

(a) *Vide* Str. 88. 2 Mod. 24. Ray. 204.

11. Herbert *versus* Borstow.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 895. S. C.]

Delivery, in consideration of being paid the value, is a sale. Supra. 2 Salk. 446. Noy 59. Vide Record 733.

CASE; plaintiff declared, in consideration that he had paid and delivered to the defendant twenty pieces of hammered money, being twenty old shillings, at his request, he the defendant promised to pay him 20 s. new money. Objected, The property is not altered; *sed non allocatur*; for a delivery, in consideration of being paid the value, is a sale.

12. Coggs

12. Coggs *versus* Bernard.

Vide Record,
page 735.

[Trin. 2 Ann. B. R. Intrat. Hill. 1 Ann. Rot. 435. 2 Ld.
Raym. 909. S. C. Comyns 133. S. C.]

CASE; whereas the defendant *assumpsit* to take up a hoghead of brandy in a cellar in *D.* and safely to lay it down in another cellar; that he *tam negligenter* laid and put it down in another cellar, that for want of care the cask was staved, and so much brandy was lost. Objected, in arrest of judgment, That there is no consideration; for the defendant is not to have a reward, and it does not appear he is a common carrier, or porter, so as to be entitled to a reward; he is only to have his labour for his pains, so that this is *nudum pactum* without consideration. But by *Holt C. J.* If the agreement had been only executory, as that he assumed to carry it, and did not, no action would have lain. Like the case of 11 *H. 4.* 33. Action, for that he promised to build him a house by such a day, and did not; adjudged it lay not in that case; but here he was actually entered upon the thing according to his promise, and therefore having miscarried, he is liable to an action: for it is a deceit upon the plaintiff who trusted him, and that is the cause of action; for though he was not bound to enter upon the trust, yet if he does enter upon it, he must take care not to miscarry, at least by mismanagement of his own. *Aliter* perhaps, if a drunken man had run upon him in the street, and thrown down the cask, or one had privately pierced it, because he had no reward. It is indeed held in *Yelv.* 128. That if *H.* deliver goods to *A.* and in consideration thereof he promise to re-deliver them, that yet no action will lie for not re-delivering them; but that resolution is not law, and was always grumbled at: And 2 *Cro.* 667. where money was delivered to pay over *sine mora*, is contrary; for though the party has no benefit, yet if he takes the trust upon him, he is bound to perform it. *Vide* 3 *H. 6.* 26. (a) *Dr. & Stud.* 129. *Owen* 141. *Keb.* 160. Judgment *pro quer. per totum Cur.*

Assumpsit to take up a hoghead of brandy in one cellar, and lay it down in another. Breach, that *tam negligenter* he put it down in the latter, that it was staved, gift. If *H.* undertake to do a thing without hire, no action lies for the non-fulfilment: But if he enters upon the doing it, action lies for a misfeasance, if through his own neglect or mismanagement, because it is a deceit; but not if by mere accident. *Kelw* 50, 78. 1 *Roll.* *Abr.* 91. pl. 16. 2 *H. 4.* 34. 19 *H. 6.* 49. 20 *H. 6.* 34. *Br.* Action sur le Case, 40, 72. 3 *H. 6.* 36. *S. C.* *Br. Ac.* tion sur Case 7. *S. C.* 3 *Salk.* 11, 268. *Holt* 13, 131, 528.

(a) See the Report in *Ld. Raym.* 158. *Jones's* Law of Bailment, *per totum.* *Elsee v. Garward*, 5 *T. R.* 151. *ing* there laid down. *Vid. H. Bl. Rep.*

13. Shore *versus* Brown.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 899. S. C.]

Indebitatus assumpsit; & in consideratione inde super se assumpsit, without saying defendant promised by default. Post. 663. 1 Sid. 246. Raym. 123.

INDEBITATUS *assumpsit*, and declares, That the defendant being indebted to him in 20*l.* for goods sold, in *consideratione inde super se assumpsit*: After judgment by default, a writ of error was brought, and now this exception was taken, That it is not said the defendant promised, so it might be a stranger. *Et per Cur.* It cannot be supposed a stranger promised, or that the plaintiff promised himself, there is no body to promise upon this record but the defendant; *aliter* perhaps, if three persons had been mentioned in the record, for it might be then uncertain to which the promise was applicable. *Et per Gould J.* There is also a difference between a collateral promise and a promise by operation of law; in the latter case, the law which raises the promise applies it. 3 *Cra* 913. *Noy* 50. 1 *Lev.* 164 (a).

[27]

(a) Vide 5 *Mod.* 305.14. Jacob *versus* Allen.

[Mich. 2 Ann. At Guild-Hall, coram Trevor Chief Justice.]

Indebitatus assumpsit. Administrator makes attorney to receive the intestate's debts; a will appearing, the letters of administration are repealed. Executor may bring indebitatus assumpsit against the attorney for money received to his use, quia administration void. *Mod. Cases* 151, 161, 309. 2 Ld. Raym. 1216.

INDEBITATUS *assumpsit* for money had and received to his use; upon evidence, the case fell out thus: *H.* having letters of administration, appointed the defendant by letter of attorney to receive money owing to the intestate, who accordingly received the same, and paid it to the administrator; afterwards a will appearing, the letters of administration were called in and repealed by citation, and now the executor brought an *indebitatus assumpsit* against the defendant for money had and received to the use of the plaintiff. Objected, 1st, That the defendant acting only as attorney for him that was in fact administrator, it was the receipt of the administrator, and not of the defendant. 2dly, That it ought to be a special *assumpsit*, and not a general *indebitatus*; for the money being received by special authority, and that expressly to the use of another, this express intent suspends and hinders the operation of law, and the raising of an implied contract to a third person: *Sed non allocatur*; for the administration was merely void, and consequently the administrator could give no authority, and so the attorney acted without authority; and then there is nothing to hinder the raising

Action sur le Case, sur Assumpsit.

raising an implied contract, and charging the defendant by *indebitatus assumpsit* to the executor (a).

(a) *R. contra, Ld. Raym.* 1210. *Semble contra, 4 Bur.* 1984. Lord Mansfield there expressed his dissent to this case, and his approbation of the case in Lord Raymond. *Semble contra, Cow.* 565. In the case of *Allen v. Dundas*,

3 Term. Rep. 125. it was ruled, that the defendant was discharged by payment to a person claiming as executor under a forged will whereof probate had been granted.

15. *Birkmyr versus Darnell.*

[Mich. 3 Ann. B. R. Intr. Pas. 3 Ann. Rot. 64. 2 Ld. Raym. 1085. S. C.]

DECLARATION, That in consideration the plaintiff would deliver his gelding to *A.* the defendant promised that *A.* should re-deliver him safe; and evidence was, that the defendant undertook that *A.* should re-deliver him safe; and this was held a collateral undertaking for another: For where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking; but it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment, against the original hirer, as well as an *assumpsit* upon the promise against this defendant. This was upon a case stated at the trial for the opinion of the Court; judgment was given for the defendant (b).

Et per Cur. If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, *if he does not pay you, I will*; this is a collateral undertaking, and void without writing, by the statute of frauds: But if he says, *Let him have the goods, I will be your paymaster, or I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.

Holt 606. 1 Danv. Abr. 68. 1 Roll. Abr. 30. Noy 11. Cro. Jac. 500. 1 Vent. 43, 268, 293, 311. Ante 23. pl. 5.

(b) *Vid. 2 Wilsf.* 94. 1 *Wilsf.* 305. 3 *Lew.* 363. *Cowp.* 227. *Bur.* 1886. 2 *T. R.* 80. *H. Bl.* 120. *Com. action upon assumpsit, F.* 3. 3d edit. 1st vol. p. 210, note a. from all the authorities

it appears, conformably to the doctrine in this case, that if the person for whose use the goods, &c. are furnished, is liable at all, any other person's promise is void, except in writing.

6 Mod. Cases 248. S. C. by name of Bour Kamire ver. Darnell. 1 Roll. Abr. 14. Where the defendant comes only in aid of another, so that there is a remedy against both, it is a collateral promise, and void by the statute of frauds: Otherwise where the whole credit is given to the defendant.

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2 Roll. Abr. 738. pl. 1. 1 Roll. Abr. 27, 32. 1 Roll. Rep. 275, 6. Cro. 1 Jac. 386. S. C. 3 Bulst. 94. 3 Salk. 15. S. C.

16. Dean *versus* Crane.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1101. called *Green versus Crane*.]

6 Mod. 309.
Assumpsit by executor on promise to testator, statute of limitations pleaded, and held that a promise to the executor within six years could not be given in evidence. Mod. Case 151, 161, 309.

PLAINTIFF declared as executor on a promise to the testator. Defendant pleads *non assumpsit infra sex annos*; and upon the trial of the issue it appeared, that there was a new promise made within six years; but it was a promise made to the plaintiff himself, and not to the testator. *Es per Cur.* He should have declared accordingly (a).

(a) To a suit by executors on promise to the testator, the statute of limitations was pleaded, and the plaintiffs had liberty to amend, by laying the promise to have been made to them-

selves. *Executors of the Duke of Marlborough v. Widmore*, 2 Str. 890. Fitzg. 193. but it is now usual to add a set of counts on promises to the executor.

17. Love's Case.

[Pal. 5 Ann. B. R.]

Assumpsit, in consideration the officer would restore goods taken on *feri facias*, to pay the debt; a good consideration. 10 Co. 102. Cro. El. 190, 199. 2 Bull. 213. 1 Roll. Abr. 291. 2 Wilson 358.

THE sheriff takes goods in execution upon a *feri facias*; a stranger promises to the officer to pay him the debt in consideration he would restore them. Upon demurrer this was argued, and compared to a consideration of suffering a prisoner to escape. *Sed Cur. contra*, by the *capias* he is to take and keep in *salva custodia*, and to give liberty is contrary to the writ, but that is now to raise the money, and the sheriff upon a *feri facias* may sell the goods, and this is no more in effect.

18. Hafler *versus* Wallis.

[Hill. 6 Ann. B. R.]

A. marries B. living a former wife, and receives the rent of her land from tenants. Adjudged that B. might bring in debt on assumpsit as for money received to her use.

THE plaintiff being a feme sole married the defendant *Wallis*, who was in truth married to another woman: *Wallis* made a lease of the wife's land, reserving rent, and received the rents from the tenants. Upon this the plaintiff discovering the former marriage, brought an *indebitatus assumpsit* against *Wallis* for so much money received to her use. And after verdict on *non assumpsit*, it was objected, that *Wallis* having no right to receive, the tenant was not discharged, and therefore an action lay against the tenant, who

who has his remedy over against *Wallis*. But the Court held *Wallis* was visibly a husband, and the tenant discharged; at least that the recovery against *Wallis* in this action would discharge the tenant, for this would be a satisfaction to the lessor (a).

(a) The action for money had and received has been very much encouraged by the Courts. In the case of *Moses v. Macferlan*, (2 Bur. 1005.) The plaintiff had indorsed to the defendant four promissory notes of 30 s. each, to be recovered against the drawer. The defendant agreed that he should not be liable to the payment of the money, and afterwards sued him for and recovered it in the Court of Conscience; and it was ruled that the plaintiff might recover it back in this action. Lord Mansfield said in that case, 'This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo & bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and interest upon an usurious contract, or for money fairly lost at play, because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering; but it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied) or extortion; or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money.—In the case of *Dutch v. Warren*, in C. B. cited in the last-mentioned case, the defendant, on pay-

ment of a sum of money by the plaintiff, agreed to transfer certain stock at a given time, which he refused to do; and an action for money had and received being brought, and damages being given to the amount of the value of the stock when it should have been transferred, (which was less than the money paid,) the Court held the action and recovery right, and said, that the extending these actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the election of the party injured either to affirm the agreement by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use. Agreeably to these principles it has been decided, that *assumpsit* for money had and received lies against a person receiving the fees or profits of an office under pretence of title, 2 Mod. 260. 2 Jon. 126. 2 Lev. 245.—against a sheriff for money levied on an execution, Comb. 430.—against the assignees of a bankrupt by a person who had paid them a debt, having a right to set off money due from the bankrupt on an insurance made by him under a commission *del credere*, and which he had paid his principal, *Grove v. Dubois*, 1 Term Rep. 112. *Bize v. Dickson*, 1 T. R. 281.—upon the commissioners order of dividend, *Brown v. Bullen*, Doug. 407.—to recover back the consideration of an annuity which became void for want of registry, *Shove v. Webb*, 1 T. R. 732. or money paid under the authority of an illegal court, (the High Commission Court before the Revolution,) *Newdigate v. Davy*, 1 Ld. Raym. 742. or levied by a justice's warrant on a conviction which was afterwards quashed, *Feltham v. Terry*, Bull. N. P. 131.—for money paid to an auctioneer as a deposit on the

- the sale of an estate when the title was defective, *Borough v. Shimmer*, 5 Bur. 2639.—or if the estate does not correspond with the description given of it by a printed particular, ——— v. *Christie*, before Lord Kenyon at nisi prius, MS.—for money paid on a conditional sale, which was rescinded, *Towers v. Barret*, 1 Term Rep. 133.—when a purchase is made, if the money is paid, and the thing contracted for not delivered, *anon.* 1 Str. 407.—for return of premium upon a policy of assurance, when the risk never commenced, *Stevenson v. Snow*, 3 Bur. 1237. 2 Bl. 315.—against a nurse, who, upon the death of a person she attended, embezzled his money, *Whip v. Thomas*, Bull. N. P. 130.—against a person to whom goods were pledged, and who refused to deliver them without payment of more than was due for the money overpaid, *Astley v. Reynolds*, 2 Str. 915.—for money paid to officers of the revenue, who seized goods as not having permit, when in fact they had, and refused to deliver them without payment of such money, *Irving v. Wilson*, 4 Term Rep. 485.—for money paid to a lottery-office-keeper for an illegal insurance, *Jaques v. Golightly*, 2 Bl. 1073. *Jaques v. Withy*, H. Black. 65.—for money of the plaintiff's expended by his clerk without his privity in such illegal insurances, *Clarke v. Shee*, Cowp. 197.—by the assignees of a bankrupt against a plaintiff at whose suit money was levied on an execution after the act of bankruptcy, *Kitchen v. Campbell*, 3 Wils. 304.—by the drawers of a bill of exchange for money paid by their friend or agent for their honor, on failure of the acceptors to whom it had been remitted with an indorsement, directing them to credit it to A. (who was their debtor,) and afterwards discounted by the defendants on a forged indorsement of it by the acceptor's clerk, (the negotiability being restrained by the special indorsement,) *Archer v. The Bank of England*, Doug. 637.—for money paid to induce a creditor to sign a bankrupt's certificate, *Smith and Bramley*, Doug. 697. *in natis*;—against a person who got possession of a masquerade ticket belonging to another, on the presumption that he had sold it, (the defendant having notice of the nature of the demand,) *Longchamp v. Kenny*, Doug. 137. [In that case Lord Mansfield observed, that great benefit arises from a liberal extension of this action, because the charge and defence are both governed by the true equity and conscience of the case, but it must not be carried beyond its proper limits];—where the defendant being a debtor of A. who was a debtor of the plaintiff, and at A.'s request marked off the amount due from A. to the plaintiff in the account of what was due from him to A. and gave the plaintiff a note which was not paid, *Ward v. Evans*, post. 442. 2 Ld. Raym. 928. *Comyns* 138.—by the *bonâ fide* bearer of a note made payable to bearer, *Grant v. Vaughan*, 3 Bur. 1525.—by the *indorsee* of a bill of exchange, who received a navy bill assigned to the drawee as security to the plaintiff till the bill of exchange was accepted, and deposited it with the drawee, who received the money upon the navy bill, and did not pay the bill of exchange, *Picton v. Dunlop*, Cowp. 571.—by the owners of a vessel for fees unduly paid by the master to a custom-house officer, *Stevenson v. Mortimer*, Cowp. 805. An information for money had and received to the king's use held to lie against a person who had received a drawback on goods not entitled to it, *Attorney General v. Comyns* 481.
- In the following cases the action for money had and received has been held not to lie:
- Where the defendant has entered into articles to account; *Bulstrode v. Gilborne*, 2 Str. 1027.—against a surety for the payment of an annuity which was void for want of registry; *Shotton v. Rastall*, 2 Term Rep. 366.—against the Treasurer of the Navy, who had paid money to a person having probate of a forged will, at the suit of the rightful administrator; *Allen v. Dundas*, 3 Term Rep. 125.—by a lottery-office-keeper against a person to whom he had

had paid money upon illegal insurances; *Browning v. Morris*, *Cowp.* 790.—upon a warranty that a horse exchanged by the defendant for one of the plaintiff was found when it was not, to recover money given on the exchange; *Power v. Wells*, *Cowp.* 819.—where the defendant sold the plaintiff a pair of horses, and undertook to take them back in a given time, they were returned, and another pair taken, without any new agreement, which were also returned, and a third pair taken, and plaintiff having offered to return these, the defendant refused to receive them; *Weston v. Downes*, *Doug.* 23. [In that case Lord Mansfield said he was a great friend to this action, and was not for stretching, lest he should endanger it: where there is a special contract, the defendant ought to have notice by the declaration that he sued upon it.]—Where the defendant had impounded the plaintiff's cattle, *damage feasant*, and the plaintiff had paid the money charged, and then brought this action to try the right; *Lindon v. Hooper*, *Cowp.* 414.—to recover stock in the funds; *Nightingale v. Devisme*, 5 *Bur.* 253, 2 *Bl.* 684.—where a servant found bank notes, and shewed them to her master, who said they were not his property, but refused to deliver them up; *Noyes v. Price*, *Espinasse's Dig.* 99.—against an officer of the revenue for duty erroneously paid by the plaintiff, which the defendant had paid over; *Greenaway v. Hurd*, 4 *Term Rep.* 553.—for an over-payment to such officer; *Whitbread v. Brooksbank*, *Cowp.* 66.—for the premium paid on a void insurance, after the risk insured against was over; *Lowry v. Bourdieu*, *Doug.* 467.—for premium paid on a void assurance, though the loss insured against happened; *Aggre v. Fletcher*, 2 *Term Rep.* 161.—by the drawee of a forged bill against an innocent indorsee to whom he had paid the amount; *Price v. Neal*, 3 *Bur.* 1354.—on an agreement in consideration of the plaintiff advancing 45 *l.* to the defendant to buy goods with, on the defendant's note payable on demand, to pay the lender the profits on a re-sale, the plaintiff having the same day demanded payment of the note, and the goods being afterwards sold with a profit of 5 *l.*; *Jestons v. Brooke*, *Cowp.* 793.—by executors whose testator borrowed money on a prohibited *respondentia* bond, which they had refunded to recover it back; *Munt v. Stokes*, 4 *Term Rep.* 561.—by a person who had distrained goods of *A.* and agreed to deliver them to *B.* on his promise to pay the rent; *Letry v. Goodson*, 4 *Term Rep.* 687.—against a carrier for money paid for booking and carrying goods which he had lost, but for which he was not answerable on account of their being fraudulently entered; *Clay v. William*, *H. Bl.* 298. In this action the plaintiff can only recover what remains after deducting all just allowances; *Dale v. Sollet*, 4 *Bur.* 2133.

19. Heyling *versus* Hastings.

[29]

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 421. Comyns 54. S. C.]

INDEBITATUS *assumpsit*, by an executor for a debt due to the testator. Defendant pleads *non assumpsit infra sex annos*; evidence was, that the goods were sold above six years ago, and that the defendant, after the six years, being requested to pay, denied that he bought the goods; but further said, *Prove it, and I will pay you*. This promise, though conditional, shall bring it back within the statute;

D 4

statute;

Carth. 470.
5 Mod. 429.
Conditional promise prevents the operation of the statute of limitations, as much as express. Cases B. R. 223. S. C. Holt 427.

statute; for the defendant waives the benefit of the act as much as by an express promise (a).

N. B. Holt reserved this for a case, and it was argued, and after the advice of the other judges was taken, he delivered it as the resolution of ten of the judges, *That if the executor proved the delivery of the goods at any time, this promise would be sufficient to bring the case out of the statute of limitations, and the executor here having proved the delivery, judgment fuit done pour le plaintiff.*

(a) An acknowledgment of the debt within six years will take the case out of the statute; *Tee v. Fouraker*, 2 *Bur.* 1099 — or saying, “you know I had not any of the money myself, but I am willing to pay you half of it;” *Yea Bart.* v. —, *Bull. N. P.* 149. (This seems to be the case reported by *Bur.* 1099. but not so particularly). In *Bland v. Haselrig*, 2 *Ventr.* 151. it was held, that the acknowledgment or promise of one out of several who were jointly indebted, did not prevent the operation of the statute in favour of the rest; but in *Whitcomb v. Whiting*, *Doug.* 651. it was decided, that where four had executed a joint and several pro-

missory note, payment of interest by one within six years bound the others. Inserting an advertisement in a newspaper, that all persons having any debts owing to them, shall be paid at a certain time and place, has been held sufficient to revive the right, *Andrews v. Brown*, *Eq. Ca. ab.* 305. In *Lloyd v. Maund*, 2 *Term Rep.* 760. it was ruled, that *what is an acknowledgment* ought to be left to the jury; and a judge having nonsuited the plaintiff upon his own opinion, that a certain letter wrote by the defendant was insufficient, a new trial was granted, *Vide Cowp.* 548. *Pres. Ch.* 385.

20. Roe versus Haugh.

[Pas. 9 Will. 3. in Cam. Scacc.]

Assumpsit, in consideration that the plaintiff would accept C. to be his debtor for 20*l.* due to him from A. in loco A. Averred, that he did accept C. fore debitorem, &c. Adjudged good after a verdict, without express averment that A. was discharged. Ante 35. 22 *Mod. Cas.* 77. *Hob.* 216. 1 *Vent.* 6. 3 *Cro.* 619. *Raym.* 302. 1 *Lev.* 20. *Comyns, Pleader C.* 61.

A. Was indebted to B. and C. in consideratione quod B. accipere vellet ipsum C. fore debitorem ipsius B. pro viginti libris debet. eidem B. per A. in vice & loco ejusdem A. super se assumpsit, & eidem B. promisit, quod ipse eandem 20*l.* eidem B. solvere vellet. Whereupon B.'s executor brought an *assumpsit* versus C. averring that B. accepted him fore debitorem ipsius B. without saying that A. was discharged; and on non *assumpsit*, verdict, and judgment *pro quer.* and judgment affirmed in *Cam. Scaccar.* where they held, it being after verdict they ought to do what they could to help it, and therefore they would not take it as a promise only on the part of C. because as such it could not bind, except A. was discharged; but they construed it as a mutual promise, viz. That C. promised B. to pay the debt, and B. promised in consideratione inde to discharge A. By which means, if B. sues A. he subjects himself to an action of debt for the breach of his promise. . .

It

It was affirmed by the opinion of four judges against three, viz. *Treby*, *Lechmere*, *Nevil*, and *Powys*, to affirm; and *Ward*, *Powell*, and *Blencoe*, to reverse.

Actions Popular.

[30]

Kirkham *versus* Wheeley.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 27. S. C. but the Opinion the other Way.]

ACTION *qui tam*, &c. defendant pleaded he was an attorney of the Common Pleas, and that attornies de C. B. have time out of mind not been suable elsewhere; to which it was demurred. 1st, Because the plea is negative, and no jurisdiction given to any other court. 2dly, Because here is no full defence, but *venit & dicit*. 3dly, Because the king is party, and has privilege to sue where he pleases. *Curia*; As to the negative, it is well enough in this case, for the privilege is not triable *per pais*, nor traversable; but it is a matter in law, and we take notice they have a jurisdiction. 2dly, *Venit & dicit* is sufficient without defence. *Vide* 14 H. 6. 13, 19. 3dly, The informer is not entitled to sue where he pleases, though the king is, and this is the informer's suit; for if he die, there is an end of the suit, and the king is not entitled till recovery. Prosecutors *qui tam* are looked upon as common informers (a).

Nota; Where a statute gives a penalty to a stranger, and he sues, he is a common informer, and shall pay costs upon the 18 *Eliz.* but where the statute gives it to the party grieved, he is not a common informer, nor liable to

pay

(a) An action *q. t.* is the suit of the informer, not of the king; *Lut.* 196. A plaintiff *qui tam* may be nonsuited; 3 *Lev.* 398. *Sav.* 56. Upon such nonsuit the defendant is entitled to costs against him; *Wilkinson, q. t. v. Allot, Cowp.* 366. The Court will not in a penal action stay proceedings until

costs of a *non prof.* at the suit of another plaintiff, are paid; *English, q. t. v. Cox, Cowp.* 322. nor upon affidavit that a former action was brought for the same offence, which the defendant had leave to compound; the fact must be specially pleaded; *Harrington, q. t. v. Johnson, Cowp.* 744. Proceedings will

Action qui tam
will not lie against
attorney of C. B.
in any other
court. *Post.* 543.
S. C. Comb.
319. 3 *Salk.*
282. *Cases B. R.*
74. 1 *Lut.* 193.
Cro. Car. 10.
Cro. El. 138.
3 *Lev.* 398.
3 *In.* 194.
1 *Leon.* 119.
Cro. El. 645.

pay costs within the 18 *Eliz.* 1 *Anderson* 116. 3 *Cro.* 177 (a).

Nota. In popular actions the defendant cannot plead several pleas. *Cases Temp. Ld. Hardwicke* 262. 2 *Stran.* 1044.

will be stayed on motion until the plaintiff gives notice of his place of abode, and, if he is out of the realm, security for costs; *Val v. Green*, *Str.* 697. Actions on penal statutes are expressly excepted in stat. 4 *Anne*, *cb.* 16, which allows double pleading; and it has been accordingly adjudged, that in them the defendant cannot plead double; *Heyrick v. Foster*, 4 *T. R.* 701. A plea of another action commenced the same term must set forth that it was commenced prior; *Combe v. Pitt*, 3 *Bur.* 1423. 1 *Bl.* 437. Informations on penal statutes are excepted in the statutes of amendment; but there is no difference between civil and penal actions with respect to amendments at common law; *Baldwin v. —*, *Bunb.* 49. *Brooke v. Day*, *Bunb.* 336. *Edgell v. Decker*, *Bunb.* 252. *Wynne v. Middleton*, *Str.* 1227. 1 *Wilf.* 256. *Bonfield, q. t. v. Milner*, 2 *Bur.* 1098. *Mace v. Lovett*, 5 *Bur.* 2833. *Richards v. Brown*, *Doug.* 113. The Court will not set aside a judgment of *non prof.* regularly obtained against a mere common informer suing for punishment; but it might be otherwise, if the party really injured sued for justice and reparation; 1 *Bur.* 401. Where a *q. t.* action has been depending four years, an amendment will not be permitted though all is in paper; *Goff v. Popplewell*, 2 *T. R.* 707. In a popular action on two counts for two *l.* penalties, the defendant had leave

to pay 5 *l.* into court generally; *Stock v. Eagle*, 2 *Bl. Rep.* 1052. If there appears reason to suspect that the action is brought merely for the sake of the issue-money, that will be ordered to be paid into court to abide the event of the suit; *Parker, q. t. v. Macfarlan*, 3 *T. R.* 137. The defendant may have *nisi prius* by proviso; 2 *Leon.* 110. A Quaker's evidence is admissible in a penal action; *Atchison v. Everett*, *Corup.* 382. If the *q. t.* informer die after verdict, his executor or administrator shall have judgment for his moiety; *Hard.* 161. if he dies after judgment, and his death is suggested on the roll; *Com. Dig. Action upon Stat. E. 2.* New trial may be granted for the mistake or misdirection of the judge, but not for the wrong conclusion of the jury after verdict for the defendant; *Wilson v. Rastall*, 4 *T. R.* 753. If the action is for several penalties, and the jury give a verdict generally for one, which the plaintiff applies to a particular count, and that cannot be supported, he cannot afterwards apply it to another which is good and sufficiently supported by evidence; *Holloway, q. t. v. Bennett*, 3 *T. R.* 448. The defendant in a *q. t.* action cannot be discharged upon surrendering his effects under the Lord's act; *Harl, q. t. v. Hawkins*, 3 *Bur.* 1322. 1 *Bl.* 372. The defendant cannot be taken in execution on a Sunday; *Rea v. Myers*, 1 *T. R.* 265.

(a) *R. acc. Corup.* 366. *Bl. Rep.* 373.

Admiralty.

1. *Opy versus Child & al.*

[Pas. 5 W. & M. B. R.]

WARD, attorney-general, moved for a prohibition to the Court of Admiralty, in a suit there for mariners wages, upon a suggestion of a contract made for them at land: and the Court held, That for convenience of seamen, the Admiralty had been allowed to hold plea for mariners wages; but yet with this limitation, that if there be any special agreement by which the mariners are to receive their wages in any other manner than is usual; or if the agreement be under seal, so as to be more than a parol agreement, in such case a prohibition shall be granted (*a*), and so it was granted in this case.

Wages due to mariners by parol after the usual manner suable in the Admiralty. Aliter, if by deed or special agreement. *Crow. Car.* 296. v. 2 *Salk.* 424. *M. Caf.* 238. *Cases B. R.* 38. *S. C.* 2 *Willson* 264. 2 *Str.* 968. 1 *Vent.* 343. 2 *Ld. Raym.* 1206. 3 *T. R.* 267.

(*a*) *Ruled acc.* 4 *Bar.* 1950.

2. *Sir Josiah Child & al. versus Sands.*

[*In Error.* Pas. 5 W. & M. B. R.]

PLAINTIFF *Sands* declared, setting forth the 13 *R.* 2. 15 *R.* 2. and 2 *H.* 4. c. 11. which gives the party grieved double damages, and 10*l.* to the king; and that he was owner of a ship lying in the *Thames infra corpus com.* laden with divers goods, wherein he had a fifth part to his own share; that the ship was ready to sail, and that the defendant caused a proceeding to be made in the Admiralty against the ship, and the ship to be arrested and staid *quousque* he gave security not to go to the *Maderas*, or *East-Indies*, whereby he was staid three months, and lost his voyage *ad damnum* 3000*l.* On *non culp.* Jury found, That the *East-India Company* by charter had the sole trade to the *East-Indies* and *Madeiras*, and that the plaintiff was going thither; and Sir *Josiah Child*, one of the defendants, was governor of the Company, and procured an order of Council to the king's advocate-general to proceed in this manner, &c. and that the defendants sued this process out of the Court of Admiralty; and if *pro quer.* jury find 1500*l.* damage, and 51*l.* costs, which were doubled in the

Cafe, for that he was owner of a ship lying *infra corpus com.* ready to sail, and the defendant stopped his voyage by procuring an order of Council for arresting her by Admiralty process; per quod the voyage was lost. 4 *Mod.* 176. 3 *Lev.* 353. 6 *Mod.* 13. 1 *D.* 6. pl. 9. *S. C.* 20. 263. pl. 7. 265. p. 11. *Carth.* 249. *Skin.* 334. *Coff.* 215. *Holt.* 744. *Bro. Ent.* 435. 1 *Mod.* 18. pl. 49:

[32]

King can lay
embargoes *pro*
bono publico
only.

A single act may
be a ground for
many actions.
3 Lev. 353.
M. or 892.
Mod. Cases 54.

Proceeding
against a ship is
within the sta-
tute of 4 H. 4.
though there is
properly no
plaintiff nor de-
fendant. 3 Lev.
353.

1 Rol. Abr. 31.
2 Lev. 27.
Dyer 159.
1 Danv. 6, 7.
2 Salk. 440.
Where joint-
tenancy is plead-
ed in abatement,
the life of joint-
tenant not named
must be averred.
5 Co. 29. 3 Keb.
212.

the judgment according to the statute. Judgment for the plaintiff in *C. B.* and now in error brought.

1st, In this case it was agreed, that the king might lay embargoes, but then it must be *pro bono publico*, and not for the private advantage of a particular trader or company.

2dly, Though here was but one act, and but one offence, yet every several person injured might have an action, and recover damages, and upon every conviction the defendant would forfeit 10 *l.* to the king. Thus, if *H.* drives a distrefs above three miles from the place it was taken, by the 1 & 2 P. & M. c. 12. he is to forfeit 5 *l.* to the party grieved. In that case, suppose the distrefs be of three cattle, and every beast hath a distinct owner, *H.* shall forfeit three times 5 *l.* *Vide Noy* 62, 158. *Dy.* 351. & 2 Lev. 8.

3dly, Though there be a process only and no suit, nor no plaintiff and defendant, yet this is a prosecution within the meaning of the statute, for it is an usual proceeding there, and of the same mischief.

4thly, That *Child* was a prosecutor within the statute, though no suit was in his name, because he promoted and maintained it: And if he did it of his own head, then it is properly his own action; if as agent to the Company, and by their command, then that command being to do an unlawful act, was void; but they held a mere attorney would not be a prosecutor within the statute.

5thly, That all five proprietors being joint-owners, should have joined in this action; but this being not pleaded in abatement, as it should have been, all is now well; for though it appears by the declaration that there were four others, joint-tenants of these goods with the plaintiff, yet it does not appear but they are dead, and then *Sands* alone is entitled to the action; and wherever joint-tenancy is pleaded in abatement, the life of the other joint-tenant not named, is averred in the plea, otherwise the plea is ill. 1 *Saund.* 29. And note, Whether these were joint-tenants or tenants in common, either way the action survives. Judgment affirmed. *Vide* 3 Lev. 351. S. C. (a).

(a) *Vide Rep. B. R. Temp. Hard.* 272.

3. Broom's Case.

[Trin. 9 Will. 3. B. R.]

Where the Ad-
miralty has ju-
risdiction, their
sentence binds

HE by letters of mart, &c. from the *African Company*, took a *French* ship in the river of *Besaw*, near *Gambore*. *Broom* carries the ship to *Africa*, and the Admiralty there

there condemned it as the king's prize: After this *Broom* sold the ship at land, and applied the money to his own use; and came into *England*, and was sued in the Admiralty here for an account. After sentence against him he appealed, and then moved for a prohibition, but it was not obtained; for the suit here is but an execution of the first sentence, by which the * ship is adjudged the king's prize; now the Admiralty having a jurisdiction, that sentence has bound the property, and we cannot examine the property, but must take it according to their determination, which cannot be gainfaid 'till it be repealed upon an appeal (a). *Adjournatur*.

the party, and at common law, Court must take it according to their determination. Comb. 444. S. C. Carth. 393. 5 Mod. 340. Cases B. R. 134. * [33] Carth. 32.

(a) The exclusive jurisdiction of the Court of Admiralty (and on appeal the commissioners, &c.) in all questions relating to prize, is fully established in the case of *Le Caux v. Eden*, Doug. 594. where it was decided that a person, imprisoned on the capture of a vessel as prize, could not, upon the vessel being restored, maintain an action of false imprisonment. The whole law upon the subject is in that case minutely stated by Buller J.

The Admiralty Court has, in the principal suit, authority to decide all collateral questions, and to award reparation to any party injured by the capture.

In the case of *Lindo v. Rodney*, re-

ported in a note to *Le Caux v. Eden*, it is settled, that the jurisdiction of the Admiralty Prize-court extends to captures at land. The jurisdiction of that Court is particularly examined by Lord Mansfield.

In both cases many authorities are adduced which fully warrant the adjudications. *Broom's* case, as reported in *Cartberw*, is referred to in *Le Caux v. Eden*. The exclusive authority of the Admiralty Court and Commissioners of Appeal on all questions respecting the rights of the captors, and in all orders concerning the disposition of the proceeds, is further confirmed in the case of *Lord Camden v. Home*, 4 T. R. 382. Vide 2 T. R. 649. Str. 1078.

4. Clay *versus* Sudgrave.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 576. S. C. by the Name, Clay *versus* Snalgrave.]

THE executor of the master of a ship libelled in the Admiralty for wages: And it was held by Holt C. J. 1st, That prohibitions were not of right, but discretionary. He said *Hale* and *Wyndham* were of that opinion, but *Kellynge* differed.

2dly, He held, it was by mere indulgence that mariners were permitted to sue in the Admiralty for their wages; and this indulgence was, because the remedy in the Admiralty was the easier and better: Easier, because they must sever here, whereas they may join there; and better, because the ship itself is answerable. But it is against the statute expressly, though now *communis error facit jus*. The first instance of it is in *Winch*. 8. yet it was never allowed the master should sue there, nor is it reasonable where

Carth. 518. by the name of Clay ver. Snalgrave. Executor of master sues for wages in the Admiralty, and prohibition granted. Prohibition not of right but discretionary. Suit in Admiralty for wages allowed to mariners by mere indulgence, but never to the master. 1 Sid. 65, 178. Hub.

67. 6 Mod. 26, where he commences the voyage as master; for though
 238. 2 Salk. the mariners contract upon the credit of the ship, the
 426. Cases B.R. master does contract on the credit of the owners.
 405. S. C. And he said the judges of C. B. were of the same opi-
 Holt 595. nion (a).

(a) Vide 2 Str. 937. Raym. 3. R. acc. Doug. 101.

5. Bayly *versus* Grant.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 632. S. C.]

Mate of a ship
 may sue for
 wages in the
 Admiralty.
 Holt 48. S. C.

THE mate sued the master for his wages in the Admiralty, and Mr. *Raymond* moved for a prohibition; because the master himself could not sue there, and the mate was not in nature of a mariner, but was to succeed the master, if he died in the voyage. Denied *per Holt* C. J. For the master contracts with the owners, but the mate contracts with the master for his wages, as the rest of the mariners do (a).

(a) A mate, becoming master during the voyage, allowed to sue in the Admiralty *quoad* the time he was mate, and prohibited *quoad* the time of his being master. Str 937. Vide Str. 858. 1 Ld. Raym. 397. 1 Cam. Dig. 3 ed. 390. Admin. E. 15.

6. Betts *versus* Hancock.

[Pas. 13 Will. 3. B. R.]

In the Admiralty principal defendant died before sentence, and they proceeded upon the stipulation against the sureties, and prohibition prayed quære.

[34]
 Raym. 78.

IN the Admiralty the principal died before sentence: Notwithstanding this, that Court proceeded against the bail upon the stipulation in the nature of a recognizance, by which he bound himself and his heirs. *Salkeld* prayed a prohibition, and insisted, the Court could not take notice of the course or law of the Admiralty being not pleaded, because it was foreign to the common law; and there was a particular reason why they took notice of the spiritual law, *viz.* That both the spiritual and temporal laws were originally administered in the same court, a reason which failed in this case: Also that lands were entirely under the protection of the common law, and they could not take stipulations in the realty. Lastly, That if the defendant had been in gaol, and had died within the walls of the prison, the suit must have abated; and there was no reason why the suit should be in a better condition by the defendant's being in custody of his bail, than in case he had been in actual custody. And that whereas the security given was only that the defendant should abide their judgment,

judgment, the Admiralty now have extended it to the defendant's executor. On the other side it was said, The bail in the Admiralty are sued as principals, and this is the course of their court, because the plaintiff and defendant, being seafaring men, are more than others subject to casualties. Adjourned and compounded.

7. Justin *versus* Ballam.

Vide the Record,
Fol. 740.

[Mich. 1 Ann. B. R. Suggest. Intr. eodem Termino Rot. 223.
2 Ld. Raym. 805. S. C.]

LIBEL, for that the ship being in great distress upon the sea, and wanting a cable, the master contracted with the defendant for a cable, which he delivered, &c. And for that he libelled in the Admiralty; the plaintiff suggested the contract was made at land, viz. at Ratcliffe upon the Thames, where the ship then lay. Broderick urged the case of *Coster* and *Lewelly*, where an hypothecation at Rotterdam was allowed to be within the jurisdiction of the Admiralty; and said, that though the cable was sold at land, yet the want of the cable was occasioned by stress of weather at sea: That that was the cause of suit, and that all matters, incident to navigation, belong to the Admiralty's jurisdiction by the laws of Oleron. *Per Cur.* By the maritime law, every contract of the master implies an hypothecation; but by the common law it is not so, unless it be so expressly agreed: In the case of *Coster* there was an express hypothecation, and that was in a place where hypothecations were allowed good; for that reason we allowed the jurisdiction of the Admiralty in that case, for there was no remedy at common law: But in this case there is nothing but a mere common contract at land; & *ideo fiat prohibitio*. Note also, the master may hypothecate either ship or goods, for the master is entrusted with both, and represents the traders as well as owners of the ship (a).

By the maritime law every contract of the master implies an hypothecation; by the common law not without express agreement. Cro. Car. 296. 1 Sid. 453. 1 Lev. 267. 1 Vent. 32. 1 Keb. 511. 3 Mod. 244. 6 Mod. 79.

Master may hypothecate the goods as well as ship. Mod. Cases 11, 12.

(a) The decision in this case, that a person furnishing a ship with stores, &c. within the realm, has not a lien on the ship, is confirmed by *Watkinson v. Barnardiston*. 2 P. Wms. 594. In *Bridgeman's case*, Hob. 11. prohibition was granted against a suit in the Admiralty against a ship impawned for the repayment of money borrowed on the high sea. The Court held, that if a ship at sea take leake, or want victual or other necessaries, whereby she

might be in danger, or the voyage defeated, the master might pawn to relieve such extremities: but in that case the contract and pawning were not said to be for such cause, nor was the impawning laid to be at sea. In *Barnsen v. Jeffries*, 1 Lord Raym. 152. where a foreign ship was for necessities hypothecated in England, the Court thought that it was no objection that the hypothecation was made at land. So in *Lister v. Baxter*, Str. 695. a ship, which

which put into *Amsterdam* in distress, was held well hypothecated for money borrowed there to repair it. In *Hutton v. Sree*, 1 *Vez.* 154. a bill in Chancery, on a demand for work done in repairing a ship, was dismissed, so far as it sought any relief against the ship, or the money arising by sale thereof. In *Watkinson v. Barnardiston*, before mentioned, it is said, that if at sea, where no treaty or contract can be made with the owner, the master em-

ploy any person to do work on the ship, &c. this is a lien on the ship; and in such case the master, by the maritime law, is allowed to hypothecate it. In *Wilkins v. Carmichael*, *Doug.* 101. it was ruled, that a captain, who had paid money for repairs, &c. done to a ship by his direction before she set out on her voyage, had no lien on the ship against the assignees of the owner, who had become a bankrupt. *Vid. Johnson v. Shippin*, *post.* 35.

[35]

8. *Transfer versus Watfon.*

[*Mich.* 2 *Ann. B. R.* 2 *Ld. Raym.* 931. *S. C.*]

Prohibition cannot be granted upon process before libel and appearance.

6 *Mod.* 11. *S. C.* by the name of *Trantor versus Watfon*.
Mod. Cases 13.
Ante 31.

PROCESS was awarded by the Admiralty at the suit of the master against the owners, to arrest the goods landed at *Bristol*, in *causa salvagii*; and now before appearance, *Broderick* moved for a prohibition, on affidavits of the matter on the process before libel, whereby it appeared the goods landed were arrested in *causa salvagii*. He cited *Sand's* case, where, on process to stay a ship in the river, a prohibition was granted before appearance. *Et per Cur.* Though the goods be now arrested at land, yet the salvage which was the cause of that arrest, might be at sea, which will appear by the libel; therefore we will not grant a prohibition before appearance or libel to try the validity of their process; the rather because the party may have another remedy by action of trespass or replevin; and this is not like *Sand's* case, for that process was not for an appearance as this is; but in the nature of an execution (*a*).

(*a*) *R. acc. Skin.* 92—3.

9. *Johnson versus Shippin.*

[*Trin.* 2 *Ann. B. R.* 2 *Ld. Raym.* 982. *S. C.*]

Mod. Cases 79. *S. C.* by name of *Johnson versus Shepney*. On the hypothecation of the master, the ship is suable in the Admiralty; but not the owners.
2 *Jones* 66, 67.
Hub. 12, 115.

A Ship put into *Boston* in *New England*, and there the master took up necessities, and gave a bill of sale by way of hypothecation; and now there being a suit against the ship and owners to compel re-payment, a prohibition was moved for. And the Court held, that the master could not by his contract make the owners personally liable to a suit, and therefore as to them granted a prohibition; but as to the suit against the ship denied a prohibition: for the master can have no credit abroad but upon giving security

erty by hypothecation, and it is not reasonable we should hinder the Court of Admiralty to give a remedy, where we can give none ourselves. *Vide Hob. 12. 1 Vent. 32. 1 Lev. 267. Hob. 115. (a).* 1 Vent. 38.
1 Sid. 418.
1 Lev. 243.
Mod. Cases 11,
12, 25. Rep.
A. Q. 30. Holt 48.

(a) The person who repairs a ship has his election in a court of common law, either to sue the master who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged; *Garnham v. Bennett, 2 Str. 816.* In *Sampson v. Bragington, 1 Vex. 443.* the owners were held liable in Chancery on an hypothecation for expences, &c. abroad. The owners are liable for repairs ordered by the master, who had a lease for his own benefit, and was under covenant to repair; *Rich v. Coe, Group. 636.* but the master is not liable for any thing incurred previous to his becoming such; *Farmer v. Davis, 1 Term Rep. 108.* neither is a person liable as owner who was only in the nature of a mortgagee when the repairs, &c. were done, and afterwards took possession; *Jackson v. Vernon, H. Bl. 114.* The Court of Admiralty has jurisdiction respecting an hypothecation made beyond sea, though under seal. The question of jurisdiction depends upon the subject matter, and not the form of an instrument; *Menetis v. Gibbons, 3 T. R. 267. Vid. Brymer v. Atkins, H. Bl. 164. Vid. also Str. 695. 12 Mod. 406.*

Administrator.

[36]

1. Hills versus Mills.

[Mich. 3 W. & M. B. R.]

A Prohibition was prayed and granted to the Ecclesiastical Court of *Canterbury*, to stay a suit there, to repeal or revoke the probate of a will, because the executor was become bankrupt, and to grant administration to another. And though one *Coates's* case was cited, where an administration was revoked for that cause, yet the Court said that differed; for the executor is constituted by the testator himself, and by him intrusted: But it seemed to be agreed, that if an executor become *non compos*, the Spiritual Court may commit administration, because that is a natural disability.

185. S. C. Skin. 299. Cases B. R. 9 Holt 305. 1 Sid. 373. 1 Show. 293;
If executor becomes bankrupt, Spiritual Court cannot commit administration; otherwise if he becomes non compos Post. 299. Br. tit. Administr. 32.
1 Lev. 158, 186. Carth. 457. Comb.

2. *Fawtry versus Fawtry.*

[Mich. 3 W. & M. B. R.]

r Shaw. 351.
S. C. Admi-
nistration of H.'s
goods may be
granted to wife
or next of kin,
or of part to one,
and part to the
other; but ad-
ministration of
wife's goods
must be granted
to the husband.
Administration
cannot be grant-
ed of part of en-
tire debt, part to
one, and part to
another. 1 Sid.
100. Br. tit.
Administ. 24,
45, 47. 1 Vent.
414, 324. Mol-
toy de Juic Mar.
364. Comb.
289. 2 Strange
891, 1118.

H. Died intestate, leaving a wife and a brother: The ordinary had granted the administration of some particular debts to the brother, and of the residue to the wife. *Et per Ward*, the Court was moved for a *mandamus* to grant administration to the wife. *Sed per Cur.* Where the husband dies, the ordinary is at election either to grant administration to the wife or next a-kin (a); for this is grounded on the 21 H. 8. c. 5. Yet in that case she shall have her share on the statute of distributions. But where the wife dies, administration must be granted to the husband by 31 Ed. 3. (b). Also the Court held, the ordinary may grant administration to the brother *quoad* part, and to the wife for the rest; in which case neither can complain, since the ordinary need not have granted any part of the administration to the party complaining. But if the intestate leave a bond of 100 l. the ordinary cannot grant administration for 50 l. to one person, and 50 l. to another, because this is an entire thing, *annua nec debitum, judex non separat ipsum*.

(a) Vide 1 Vern. 315. Ray. 93. 2 Jon. 162. Str. 552.

(b) Vi. Cro. Car. 106. Jon. 175. 1 Sid. 409. Mo. 871. Stat. 29 Car. 2. cb. 10.

[37]

3. *Manning versus Napp.*

[Trin. 4 W. & M. B. R.]

Case by admini-
strator under the
king's letters pa-
tent for mali-
ciously hinder-
ing him by ca-
veats, per quod
he was put to
great charge, &c.
no gift. Pro-
perty is in the
ordinary till ad-
ministration.
Administration
to person dying
intestate without
kindred. Ad-
ministrations be-
longed to the
bishop originally.
1 Lev. 158, 159,
186, 187.
VI. Doug. 542.

H. Died intestate, leaving no children or kindred: The king appointed the plaintiff to take out administration; the defendant, though he knew there was no kindred, entered caveats, and put the plaintiff to great charge. For this cause the plaintiff brought an action. Upon demurrer the Court doubted whether an action would lie; because, though there was a *damnum*, yet it was *absque injuria*; for the property of the goods till administration was in the ordinary, and the plaintiff had neither *jus in re* nec *ad rem*. Otherwise, had the plaintiff been next of kin, because he had a right to administer by the statute; and the king's appointment by letters patent was but a kind of recommendation. For they held, That in case of an intestate without kindred, the ordinary may dispose *in pias usus*; but the usual course is for some one to procure the king's letters patent, and then the ordinary admits the patentee

patentee to administration; but the Court thought this was rather of respect than of right, and they denied the opinion in *9 Co. Henstee's case*; and held that administrations originally belonged to the bishops, and the instance of some lords of manors is not a proof of the contrary.

4. Hilliard *versus* Cox.

[Pasch. 12 Will. 3. B. R. 1 Ld. Raym. 562. S. C.]

IN debt by an administrator on an administration committed *per episcopum L. &c.* defendant pleaded in bar, that the intestate *tempore mortis* was resident in another diocese; and it was held good upon demurrer. *Et per Cur.* The simple contract debts are personal, and administration must be committed of them where the party dies. And if a man have two houses in several dioceses, and lives most at one, but sometimes goes to the other, and being there for a day or two dies, administration of his personal estate shall be granted by the bishop of this diocese, for he was commorant there, and not there as a traveller (a).

Plea of residence in a different diocese from that where administration is granted.

(a) *Vide* the Record, pa. 747. and the report in *Ld. Raymond*, from which it appears to have been pleaded, not that the *intestate tempore mortis*, but that the *defendant*, at the time of the intestate's death, resided in another diocese; and to have been held

by the Court, that administration is to be granted in the diocese where the debtor was commorant at the decease of the *debitee*. *R. Dy. 305. a. in marg. Offic. Ex. c. 4. § 2. Vide 2 Vex. 35.*

5. Gidley *versus* Williams.

[Hill. 12 Will. 3. B. R. 1 Ld. Raym. 634. S. C. 12 Mod. 443. S. C.]

Vide Record, page 749.

DEBT, and declares on a bill obligatory as administrator, not saying in the body of the declaration by whom administration was committed, and concluding with a *profert literas administratorias præd. Richardi*, who was the intestate. * Defendant pleaded *non est factum*; and verdict for the plaintiff. And now exception was taken to the declaration. *Et per Cur.*

In narr. per. Administrator. Want of alleging by whom administration was committed, is cured by pleading *non est factum*, and a verdict.

* [38]

1st, Want of shewing by whom administration was committed, is naught upon demurrer; for it might be by a peculiar, and then it must be averred, *cui administrationis commissio de jure pertinuit*; or, *loci illius ordinarium*. And there is a good reason why it should be set forth by whom administration was committed; for the defendant may

1 Lutw 8, 297.
1 Sid. 228.
Cro. El. 6, 431.
456, 838, 879.
Stil. 282. 6 Mod.
135, 136.
35 H. 6. 46.
2 Cro. 556.
Sho. 355.

contest the right of the person granting, and may plead administration was granted to another, or that there were *bona notabilia* (a).

Nelson's Intw.
222. Style 106.

2dly, A verdict does not help this, for it is not a matter necessary to be proved upon this issue, the title of the administrator being not then in question (b).

M. H. 8550w. 355.
1 Lev. 193, 78.
Cassell 242 Ray. 408.
4 Mod. 133.
Lev. 3. 1.

3dly, They held, This defect was cured by the defendant's plea in chief, which admits the plaintiff to be a good administrator.

4thly, They held, that though the verdict did not cure it at common law, yet it was now remedied by the 16 & 17 Car. 2. c. 8. And judgment *pro queri* (c).

(a) 2 Cro. 89.

(b) 3 T. R. 25.

(c) See *Avery v. Hoole*, Cowper 825.

6. Blackborough *versus* Davis.

[Pas. 13 Will. 3. B. R. 1 Ld. Raym. 684. Comyns 96.
1 P. Wms. 41. 12 Mod. 615. S. C.]

Post. 251. Administration granted to the grandmother, and mandamus prayed to the Spiritual Court to grant it to the aunt, and denied. Holt 43.

Administration void, when granted by a wrong ordinary, and voidable when granted to a wrong person. 6 Co. 18. b. Cro. El. 460. Mo. 396.

Ecclesiastical Court may grant administration to which they will of kindred in equal degree. 2 Lev. 55, 56.

1 Vent. 324. 1 Lev. 186, 187. Ante 36. pl. 2.

ADMINISTRATION being granted to the grandmother, the aunt moved for a mandamus to have it granted to her, urging that the first administration was void, she being nearer in degree; and that there needed no repeal, this administration being granted to a wrong person, in which case the very grant of a new administration amounts to a repeal. 1 And. 303. Owen 50. Cro. El. 460. 1 Sid. 371. Holt C. J. *contra*.

1st, It is not void, as where administration is granted in a wrong diocese, but only voidable; for at that rate trover would lie against the first administrator, and there would be a nullity in all mean acts. If administration be committed to a creditor, and after repealed at the suit of the next a-kin, he shall retain against the rightful administrator, and his disposal of the goods, even pending the citation, till sentence of repeal, stands good.

2dly, If in equal degree, the Spiritual Court have election, and the grandmother is as near as the aunt, because the descent to either would be a mediate descent, the mediation of which is the father, *mediante patre*. It is enough at law to say, *frater & heres*, or *soror & heres*. But the Court thought the advantage on the grandmother's side, in this respect, that she stands in *linea recta*.

3dly, This is a matter contestable in the Spiritual Court, whereto she ought to apply herself, and it does not appear she has: *Ergo* the mandamus denied.

After

After this the aunt came and moved for a mandamus to oblige the Ecclesiastical Court to cause a distribution, and that was denied. *Vide* title *Distribution*.

7. Freke *versus* Thomas.

[Pas. 13 Will. 3. B. R. 1 Ld. Raym. 667. S. C. Comyns 110. S. C.]

AN administrator, *durante minore etate* of an administrator, may act and sue till the administrator, in whose right he acts, be of the age of twenty-one years; for administrators are by the statute, and one is not a legal person in the eye of the law, capable to act for another as trustee, till twenty-one. So that *durante minore etate* of an administrator shall be understood during legal minority, i. e. twenty-one, before which age he is not by judgment of law fit for the trust; otherwise where it is the act and judgment of the party, as where one is made executor; for by the spiritual law he may be an executor at seventeen, and therefore an administration *durante minore etate* of an executor ceases at that time: Adjudged in debt upon a bond.

Administration *durante minore etate* of administrator ceases at the age of 21. Of executor, ceases at the age of 17. Cro. Car. 516. 5 Co. 29. 2. 6 Mod. 304. 2 Lev. 37. 1 Rol. Abr. 910. 1 Sid. 57. 5 Mod. 395. Comb. 475.

Note also a necessity for this; for the Spiritual Court will not grant administration to any one under twenty-one; and this is by construction on the statute of distributions, because they are to give bond, &c. (a).

(a) R. accord. 1 Ld. Raym. 338. *Jones v. Lord Strafford*, 2 Bac. Ab. Carib. 446. Com. Rep. 159. *Vide* 382. Executors B.

8. Burston *versus* Ridley.

[Mich. 1 Ann. B. R.]

H Entered into a recognizance of 100 l. before Glin C. J. of the Upper Bench in 1658, to A. On a certificate of this into Chancery, there issued a writ of extent, reciting a recognizance for the same debt, taken before Glin C. J. of the Common Pleas, requiring the sheriff to extend the lands of the consor. Accordingly certain lands were extended, and upon a *liberate* delivered to J. S. who died possessed of goods *valoris* 5 l. in the diocese of London, and also in Durham, lessor of the plaintiff in ejectment took administration in Durham and also in London, and in that right took out a new extent, and brought an ejectment. And the Court held, that unless the first extent was void, the second could not be good, for the party

Where there are bona notabilia in several dioceses in the same province, Prerogative Court must grant administration; but where in one diocese of one province, and in another diocese of another province, each bishop must grant an administration. Far. 15. 3 Mod. 324.

Hard. 216. 1
 Lev. 78. 1 Roll.
 Abr. 508, 9.
 2 Leon. 155.
 Cro. El. 283,
 315, 457. 2
 Bull. 2, 3, 4.
 11 H. 7. 12.
 9 Ed. 4. 33.
 2 Lev. 86. Vi.
 Str. 74.

[40]

could not have two extents, nor two satisfactions. But it was objected to the plaintiff's title, that he should have had a prerogative administration. *Sed Cur. contra.* For neither archbishop has to do in the other's province. If a man leaves *bona notabilia* in several dioceses of the same province, there must be a prerogative administration. If one leaves *bona notabilia* in two dioceses of *Canterbury*, and two dioceses in the province of *York*, there must be two prerogative administrations; but if it be as here, it is otherwise, and this administration in the one diocese and the other was held good.

9. Adams *versus* Ter-tenants of Savage.

[Pas. 3 Ann. B. R. 2 Ld. Raym. 854. S. C. *quod vide.*]

Mod. Cases 134,
 199, 226. Ad-
 ministration in
 Dorset: as title to
 a judgment in
 any of the Courts
 at Westminster.
 Post. 601, 699.
 Far. 5. Mod.
 Cases, &c. 245.
 S. C. Salk. 601,
 679. 3 Salk.
 321. Holt 179.
 Lill. Ent. 228.
 S. C. Ante 15.
 Vide Skin. 237.

SCIRE facias on a judgment in *B. R.* as administrator of *J. S.* and by his *profert* shews an administration granted by the archdeacon of *Dorset*. The heir and ter-tenants pleaded *riens per descent, &c.* and the plea being adjudged naught, the *scire facias* was abated by judgment *quod nihil capiat per breve*; which in this case the Court said was a bar to the action of the writ, but not to the action; and the reason of their judgment was, because the plaintiff having made this administration his title, the Court could not intend any other, and the pleading over could not admit *that* to be a title which to the Court appeared to be no title.

10. Denham *versus* Stephenfon.

[Trin. 3 Ann. B. R. & 4 Ann. in Cam. Scacc.]

Post. 307, 325.
 Declaration upon
 administration
 granted by the
 official of a pec-
 cular, debito
 modo commissa
 fuit, sufficient
 without averring
 that he had ju-
 risdiction of
 administrations,
 1 Mod. 214.
 2 Jones 72. 1
 Lev. 78. 1 Lev.
 311. 2 Mod. 65.
 Ante 38. 3 D.
 382. p. 10. S.
 C. 6 Mod. 241.
 H. 145. Co-
 myns 17.

WILLIELMUS Denham gen. administrator, &c.
cui administratio bonorum & catallerum jur. & credi-
torum qua fuerunt A. B. tempore mortis sue per Thomam
Croftland artium magistrum commissarium sive officialem pecu-
liaris & specialis jurisdictionis de, &c. legitime fulcit. debito
modo commissa fuit; and concludes with *profert hic in Cur.*
litteras, &c. and so declared in debt against the defendant
 as heir at law, upon the bond of his ancestor; defendant
 demurred generally: Mr. *Raymond* argued, That the Court
 could not take notice that every peculiar had a right to
 grant administration, and that it being a jurisdiction against
 common right, it ought to be averred according to the pre-
 cedents, *cui de jure commissio administrationis in hac parte*
pertinet. And the *debito modo commissa* affirms the regula-
 rity of the manner of proceeding, not the sufficiency of the
 power

power and jurisdiction. Of this opinion was the whole Court; and *Salkeld*, who was ready to argue it for the plaintiff, was stopped by the Chief Justice, & *quievit*. Afterwards, when the Court came to give judgment, *Holt C. J. Gould & Powys, mutata opinione*, held the declaration to be good, and that the *debito modo* was a sufficient averment; and the Chief Justice said, there was no peculiar but had the power of granting administration, and that this was a needless exactness, not so much regarded latterly as it had been in former times, when it was thought not enough even to shew an administration committed by a bishop, without averring there were *nulla bona notabilia*. Judgment *pro quer.* *Powel* abiding by his former opinion. Upon this judgment a writ of error was brought in *com. Scaccar.* And Mr. *Lutwyche* for the plaintiff insisted upon the reasons of *Raymond*, and cited all the cases. *Salkeld* argued, that every ordinary hath power to grant administration, *et quod quicumque habet ordinariam jurisdictionem est loci illius ordinarius.* *Lyndewode l. 1. t. 3.* And the 31 *E. 3. c. 11.* ordains, That where any person dies intestate, the ordinary shall commit administration: That there is no peculiar but what hath an ordinary; for it is a peculiar for that very reason, that it is exempt from the common ordinary, and under a peculiar or special ordinary of its own. 2dly, He insisted, that peculiars must be royal, archiepiscopal, episcopal, or archidiaconal; and that in every one of these, the owner has a power, even of common right, to grant administration. *Vide All. 53.* declares of an administration, granted *per Car. Regem*, held good; for the king is supreme ordinary: Like case 1 *Bul. 4.* from the nature of the thing, therefore it is the same in effect to say, administration was granted by the official of a peculiar, as to say it was granted by the official of a diocese. And as to its being against common right, the ordinary of a peculiar does no more prescribe for his ordinary power, or for his peculiar, than the bishop of a diocese. Where the lord of a manor hath this jurisdiction, he that has an administration there declares of it as committed *per A. B. dominum manerii cui administrationis commissio de jure pertinet per consuetudinem infra maner. prad. à tempore cujus contrarii memoria hominum non existit usitat. & approbat. debito modo commissa fuit.* And as to the books and cases, they are easily reconciled by this difference, *viz.*

Wherever the power of him that grants administration is by commission, the plaintiff in his declaration must aver he had authority, *viz. cui jurisdictio in ea parte pertinet, or legitima autoritate fulcitur.* Thus 3 *Cro. 431. per A. V. theologie professorem*, naught; 3 *Cro. 791. per A. B. decan. de L.* naught; *Hetley 68. per A. B. chancellor of Chester*, naught; because these were by special commission under

Every peculiar has power of granting administrations. 3 *Lev. 193. 3 Cro. 102. Vide 1 Saund. 402. Style 282. Ordinary, quid,*

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Peculiar, quid. -

Kinds of peculiars.

Mod. Cases 308. Style 106. Show. 355. 4 Mod. 133.

Thom. Entr. 342.

Where one grants administration virtute officii, plaintiff need not aver his authority; aliter where by special commission. 1 *Sid. 228.*

2 Lev. 55. 96.
2 Saund. 148.
7 Roll. Abr.
919. Cro. El.
6. 431. Mod.
Cafes 242.
5 Mod. 425.

the ordinary; but where the power of him that grants administration is not by commission, but by office or privilege, it need not be averred, because the office imports the power as incident, and the law takes notice of the office. *Vide* 29 H. 6. pl. 9. Declares of administration *per Abbatem Westm. loci ill. ordinari.* good, for ordinary implies as much. 11 H. 4. 64. pl. 16. declares of letters of administration from the commissary of the bishop, good; for the law knows every commissary must have that power. So 3 Cro. 102. *Lacy versus Smith*; *per A. B. officialem* of the bishop, good. So 1 Lev. 193. *per* such an archdeacon, is good. Judgment was affirmed *per tot. Cur. (a).*

(a) *Vi. Bac. Ab. 442. Executors O.*

[42]

11. Slaughter *versus* May.

Vide Record,
page 751.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1071. by the name
Slater *versus* May,]

6 Mod. 304.
Administration
may be granted
to A. during the
absence of J. S.
but in law it
must be averred,
that J. S. is ab-
sent. 1 Roll.
Abr. 888, 998.
1. 10. 610. Cro.
El. 602. N.
Lutw. 102. &c.
Goldf. 136. 2 Brownl. 83. Heb. 250. 3 D. 351. p. 4. S. C. 5 Salk. 25. 2 Bacon's
Abr. 415. Executors E.

H. Being administrator *durante absentia* J. S. executor, brought an action of debt on a bond, but did not aver where J. S. was absent, or that he was absent. *Cur.* It is but reasonable the ordinary have power to grant administration during absence, as well as during minority, or *pendente lite*; and such administrator is accountable to the executor: We will intend it is absence beyond seas, but the plaintiff ought to aver he was absent. Judgment *pro def. per Cur. (b).*

(b) *R. acc. Lut. 342.*

Clerk *versus* Withers.

[Mich. 3 Ann. B. R. *Vide title* Execution, 2 Ld. Raym.
1072. S. C.]

12. Weston *versus* James.

[Pasch. 9 Ann. B. R.]

Upon a writ of
inquiry after in-
terlocutory judg-
ment revived by
scire facias for
statute 8 & 9
W. 3. c. 10. the
final judgment;

DEBT upon a bond against an administrator; de-
fendant pleaded assets in his hands to the value of
200 l. only, and that A. obtained a judgment against the
intestate in *assumpsit* by *nil dicat*, and that the intestate died,
and that after a *scire facias* was awarded against the de-
fendant for damages on the said judgment, upon which he,
having

having no cause, a writ of inquiry issued, and damages thereupon found to the value of 300 *l.* and judgment given thereupon for the plaintiff *quod recuperet dampna pred.* against the said intestate, and avers that he had no assets *ultra*. To this plea it was demurred. It was admitted that this plea at common law had been naught, for by the death of the defendant the action had abated, and judgment could not be given against him after his death; but the question was on the 8 & 9 *W.* 3. *c.* 10. which after interlocutory judgment gives a *scire facias* against the administrator in case of the defendant's death, which was compared to the case of a judgment on the 17 *Car.* 2. *c.* 8. where the defendant dies after verdict. But to this it was answered, That the said statute makes the judgment good against the defendant himself only, and makes not a judgment against his executor or administrator; but by this act it is to be a judgment against the executors or administrators of the party, for they are expressly taken notice of for that end, and the *scire facias* is to be against them; and all this appears on the same record, and therefore this can never be made a judgment against the intestate himself, nor so pleaded; to which the Court inclined.

must be against the administrator and not the intestate.
6 Mod. 142. *Q.*
Far. 64. 1 Lev.
278. Raym. 16,
55. 1 Sid. 131.
Poth. 325.

Advowson.

[43]

1. Bishop of Salisbury *versus* Philips.

[Mich. 11 Will. 3. B. R. Rot. 377. *In Error.* 1 Ld. Raym. 535. S. C.]

Vide Record,
page 754.

ERROR of a judgment in *C. B.* in *quare impedit*. Plaintiff counts that *A.* and *B.* were seised in fee as joint-tenants of the advowson, *ut de grosso*, and by indenture agreed from thenceforth to be seised thereof as tenants in common, and not as joint-tenants, and they and their respective heirs should present severally and by turns, and shews several presentations alternately; and that *A.* died, and his moiety descended to *C.* and makes his title by grant of the next presentation from *C.* to *D.* his executors, administrators, and assigns; in whose life the church became void, and that *D.* made his will and died, and it

12 Mod. 321.
Carth. 505. S.
C. 2 Salk. 559.
Lutw. 1084 to
1130. *Quare*
impedit. De-
clares upon an
agreement by in-
denture, between
joint-tenants, to
present by turns.
2 Mod. 97.
Holt 52.

Co. Lit. 164. B.

Composition may be three ways. 1st, By record, either between privies in blood or strangers, and in case of a wrongful presentment the patron is not put to a quare impedit, but may sue a scire facias.

[44]

2dly, By deed, either between privies or strangers, which, if once executed on all sides, H. may declare in quare impedit, without mentioning the composition. 3dly, By parol, between privies only. Co. Ent. 496. Dyer 29.

belongs to the plaintiff as executor to present: Bishop claims title by lapse; plaintiff replies, the testator presented Symes within six months, and the bishop refused him; defendant rejoined, he gave him three days time to prepare for examination, and he never came again; *absque hoc*, that the bishop refused Symes at the presentation of the testator. Upon this issue was taken a verdict *pro quer.* and also judgment in C. B. and now error in this Court. Cartbaw objected, that the plaintiff had made no title; for the agreement to present by turns did not sever the right; the indenture did not work a partition, but an agreement, which is now broken, for which the plaintiff may take his proper remedy. This cause was several times moved, and Holt C. J. held it to be a good partition the first time it was spoken to, saying, That where the thing and the profits are the same, a partition of the profits is a partition of the thing; and though perhaps the agreement cannot make two advowsons out of one, yet it has created several and distinct rights to present alternately. Afterwards, when judgment was affirmed, the Chief Justice said, That a composition might be either by record, or by deed, or by parol: that if either privies in blood, as co-partners, or strangers in blood, as tenants in common or joint-tenants, agree by record to present by turns, and one present, the other is not by usurpation put to a *quare impedit*; and that, whether the presentation be by one privy to the agreement, or by a stranger. *Vide West. 2. 5. 2 Inst. 362.* 2dly, That if either privies in blood, as parceners, or strangers, as tenants in common or joint-tenants, agree by deed to present by turns, the composition is good; and if it be once executed on all sides, he that brings a *quare impedit* need not mention the composition, which shews the very right and inheritance to be severed, and that a separate interest is vested in each of them to present alternately, and that the plaintiff needed not have declared of the composition or indenture in this case. *Vide Dy. 29.* 3dly, By parol, for so a composition may be between parceners; but between strangers in blood composition cannot be without deed. *Vide F. N. B. 60, 62. d. f. 11. H. 4. 3. b.* Judgment affirmed.

Age.

Anonymous.

[Mich. 3 Ann. B. R.]

IT has been adjudged (a), that if one be born the first of Post. 625, 413, 627. 2 Mod. 215. 6 Mod. 260. February at eleven at night, and the last of January in the twenty-first year of his age, at one of the clock in the morning, he makes his will, of lands, and dies, it is a good will, for he was then of age. *Per Holt C. J.*

(a) In *Herbert v. Tarbol*, *Keb.* 589. *Fitzbugh v. Dennington*, 2 *Ld. Raym.* Sid. 162. *Raym.* 84. The case in 1094. It is also cited, 1 *Ld. Raym.* which it was mentioned, *M.* 3 *Ann.* is 480. 3 *Wils.* 274.

Ale-houses.

[45]

Stephens *versus* Watson.

[Mich. 13 Will. 3. B. R.]

PER *stat.* 1 *Jac.* 1. *chap.* 9. Ale-house-keepers are to forfeit 10 *s.* to the poor, if they permit any inhabitant of the place to sit tippling above an hour. *Vide* 4 *Jac.* 1. *c.* 5. 21 *Jac.* 1. *c.* 7. 3 *Car.* 1. *c.* 3. against drinking.

Before the 5 & 6 *E.* 6. it was lawful for any one to keep an ale-house without licence, for it was a means of livelihood, which any one was free to follow. But if it was disorderly kept, it was indictable as a nuisance. By 5 & 6 *E.* 6. *c.* 25. two justices, one of the *quorum*, may suppress ale-houses. Ale-house-keepers, how and in what cases punishable. 3 *Salk.* 26. *S. C.* *Andrews* 82. *Post.* 471.

2dly, None are to keep ale-houses unless licensed by sessions, or by two justices, upon a recognizance not to allow gaming, and to keep good rule and order.

3dly,

3dly, Any one, that not being thus qualified keeps an ale-house, may be committed three days and held to a recognizance, with two sureties, to be certified to sessions.

Show. 263.

Note. This statute extends not to inns, for they are for lodging of travellers; but if an inn degenerate to an ale-house, by suffering disorderly tippling, &c. it shall be deemed as such.

If a man keep an ale-house without licence, he may be committed for three days by the act, but he is not indictable, because the statute which makes it an offence, has made it punishable in another manner (a.)

Nota. "There is a difference between suppressing an unlicensed ale-house and one that is licensed,

(a) This subject is elucidated by the following cases: *Rex v. Wright*, 1 Bur. 543. An indictment against a clergyman for farming land contrary to 21 Hen. 8. ch. 13. which enacts, "That no spiritual person shall take to farm, &c. under pain to forfeit 10*l.* per month," was quashed. Lord Mansfield said, he always took it, that where new-created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie; but where there is a prohibitory particular clause, specifying only particular remedies, there such particular remedy must be pursued. *Dennis* J. said, Where an offence is not so at common law, but made an offence by act of parliament, yet an indictment will lie where there is a substantive prohibitory clause in such act of parliament, (though there be afterwards a particular provision and a particular remedy given,) but it is otherwise where the act is not prohibitory, but only inflicts the forfeiture and specifies the remedies: and *Wilmot* J. concurred in that opinion.

Rex v. Robinson, 2 Bur. 799. An indictment against the defendant for not performing an order of two justices for the maintenance of his grandchildren, was, on motion in arrest of judgment, held good, for the non-performance of a legal order is an offence at common law: and it was said *per Curiam*, where the offence was antecedently punishable by a common law proceeding, and a statute pre-

scribes a particular remedy by a summary proceeding, the prosecutor is at liberty to proceed either way. But, notwithstanding there are two remedies given, yet it would be extremely oppressive to take the remedy by indictment, if there are no circumstances which obstruct the proceeding in the shorter way of summary remedy. In *Rex v. Boyall*, 2 Bur. 832. the Court refused to quash an indictment for not working on the highway pursuant to order, and recognized the doctrine in the preceding case. *Rex v. Balme*, Cowp. 648. Indictment against surveyors of a highway for not widening a highway according to an order of justices, held good, though there is a particular punishment for offences against the highway act. By *stat.* 26. G. 2. c. 6. *f.* 1. the king is impowered to issue orders respecting quarantine; and it is provided, that all ships, &c. shall be subject to such orders. By *f.* 5. particular penalties are enacted for disobeying them. The person disobeying is punishable by indictment or information, *Rex v. Harris*, 4 T. R. 202. It should be observed, that if a statute creates an offence without a summary remedy, which is therefore indictable, and a summary remedy is given by a subsequent statute, it remains indictable in the same manner as if it was an offence at common law. Such are the cases of *Regina v. Gould*, *post.* 381. *Rex v. Davis*, cited 2 Bur. 803. *Rex v. Jackson*, Cowp. 297.

"Where

“ Where an ale-house is licensed, the justices, to suppress it, must either proceed upon the recognizance, the condition whereof must at least be broken; and therefore his having another trade, or being a bailiff, can be no cause in such case: or by indictment; and then there must be such disorders as prove a nuisance.

Post. 470. Jurisdiction of justices of peace to suppress ale-houses licensed and unlicensed.

“ But where an ale-house is unlicensed, the justices may suppress it at discretion; for on the denial of a licence no appeal lies, and the statute, which gives the justices a power to suppress where they should think convenient, would signify nothing, if it did not extend to such cases; for it cannot extend to ale-houses that are licensed, because they are not punishable without a breach of the recognizance. And as to those that are unlicensed, if they be suppressed by commitment of the owner, the want of a licence can only come in question, and not the reason and cause why it was denied.”

[46]

Aliens. *Vide* Allegiance, Denizen.

1. Wells *versus* Williams.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 282. 1 Lutw. 34, 35. S. C.]

IF an alien enemy comes hither *sub salvo conductu*, he may maintain an action; if an alien *am*y comes hither in time of peace, *per licentiam domini regis*, as the French Protestants did, and lives here *sub protectione*, and a war afterwards begins between the two nations, he may maintain an action; for suing is but a consequential right of protection: and therefore an alien enemy, that is here in peace under protection, may sue a bond; *aliter* of one commorant in his own country (a).

Alien amy, or enemy living here under protection, may bring action, because suing is a consequence of protection. Far. 150. Cro. El. 683. Co. Lit. 129. Co. 16. b. Calvin's case. Cro. Car. 9.

Post. 186. 2 Stran. 1082. Andr. 76.

(a) See Bur. 1734. Doug. 619, 627, 2 ed. n. 132. Fortesc. 221.

2.

TURKS and infidels are not *perpetui inimici*, nor is there a particular enmity between them and us; but this is a common error founded on a groundless opinion of Justice

Turks and infidels not *perpetui inimici*.

Justice *Brooke*; for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons. *Per Littleton*, (afterwards lord keeper to King *Charles I.*) in his reading on the 27 *E. 3.* 17. *M. S.*

[47]

Amendment.

See rules relative to amendments of pleadings. *Cases Temp. Ld. Hardwicke*, 43, 44, &c.

1. Anonymous.

[Pasch. 5 Will. 3. B. R.]

Reasons of amendments while in paper. 2 *Salk.* 520. *Far.* 123. 5 *Mod.* 17. *Post.* 88. 2 *Burro.* 1098, 1099. 2 *T. R.* 707.

WHEN a declaration is come to be in parchment, the Court can mend no farther than is allowable by the statutes of amendments, for it is then a record; but while it is in paper the Court may mend at pleasure; for it is not within the statutes of amendments (a).

(a) *Vide St. 5 G. 2. c. 13.*2. The King *versus* Knowles.

[Trin. 6 Will. 3. B. R.]

Plea to indictment of murder amended after replication, and before entry upon the roll. *Ante* 3. *Far.* 38. *Post.* 50, 509. 3 *Salk.* 242. *Carth.* 297. *Comb.* 273. *Skin.* 336, 517. *Cases B. R.* 55. *Holt* 530. *Trem.* 11. 8 *S. T.* 50, 58.

INDICTMENT of murder. The defendant pleaded that he was Earl of *Banbury*, &c. Attorney General replied, &c. Earl of *Banbury* moved to amend his plea, and had leave, (*Holt* doubting,) because the pleading was not perfected nor entered upon record: And there having been several amendments in criminal cases. *Vide* 2 *Cro.* 529. 2 *Ro. Rep.* 59. *Sid.* 225, 243. *Cro. Car.* 144. *Nota.* The plea was filed, but not entered upon the roll; and the Court held, that before judgment, while things were *in fieri*, and in agitation, they had a power over all proceedings (b).

(b) *Per Lord Mansfield.* The rule is, that whilst all is in paper, you may amend at common law; and in such amendments there is no distinction between civil and criminal prosecutions;

but amendment of the record itself, by the statutes of amendment, extends not to criminal prosecutions. 4 *Bur.* 1099.

3. The King *versus* Harris & al.

[Hill. 6 W. 3. B. R.]

MOTION was made to mend an information of perjury, and opposed, because the defendant had pleaded. *Et per Holt* Chief Justice, As to mending after plea pleaded there is no great matter in that; after a record has been sealed up, I have known it amended, even just as it was going to be tried (a).

1 Lev. 184, 189.
Post. 50. Information may be amended after plea pleaded.
3 Lev. 347.
Skin. 336.
4 T. R. 457.

(a) *Vide Wilkes's case*, 4 Bur. 2527. may be amended after the record is where the point was discussed at large, made up and sealed.
and held, that a criminal information

4. The King *versus* Keat.

[Hill. 8 & 9 W. 3. B. R.]

A Verdict general or special may be amended by the notes of the clerk of assize, but this is in civil, not in criminal cases. *Vide 1 Ro. Rep.* 82. A special verdict amended by the * notes of the counsel in the cause after error brought. *Vide 3 Cro. 149, 150. Cro. Car.* 145, 338. 4 Co. 52. 2 Co. 185. (b).

Verdict may be amended by notes of the clerk of assize in civil cases, not in criminal. *Cro. El.* 677, 678. 2 Jo. 211. *Litt. Rep.* Post 53. pl. 19.

61. 5 Mod. 287. S. C. Comb. 406. Skin. 666. Holt 481. 3 Salk. 191. Mod. Cases 165. Moor 689. Cro. Jac. 239.

*[48]

(b) *Vide Cramp. Prac.* 1 vol. 2 edit. 281. 5 Bur. 2661. Bunb. 283.

1 *homp R* 104 -

5. Bishop of Worcester's Case.

[Mich. 8 W. 3. B. R.]

EJECTMENT against seven defendants, who enter into the common rule for confessing lease, entry, and ouster, and plead to issue. The plea-roll was right, so was the *venire*, *disfringas*, and the *jurata*; but the issue in the *nisi prius* roll was between the plaintiff and five defendants only, which was tried, and verdict *pro quer.* and an amendment being moved for, it was opposed, because it was to alter the verdict, to subject the jury to an attain, to make another issue, and to make two defendants guilty who were not tried: but it was amended; for nothing could be inquired of but the title of the lessor, and the issue depended on his title, which is not altered by this amendment.

Post. 49. Ejectment *versus* seven defendants, and all join in the common rule, and the issue was right in the plea-roll, &c. but the *nisi prius* roll was *versus* five only; and after verdict *pro quer.* this was amended by adding the other two defendants.

1 Roll. Abr. 205.
Style 339.
2 Mod. 316.
Comb. 393. Str.
843. Rep. B. R.
Temp. Hard. 21.

amendment. And it must be considered that all seven entered into the common rule, and that the plea-roll, &c. are all right, and this cannot be intended other than the same issue, and the amendment is only to rectify a plain mistake, and make that the issue which was apparently intended to be so.

6. Puleston *versus* Warburton & al.

[Pas. 9 W. 3. B. R.]

5 Mod. 332.
Demise in ejectment laid 1697 for 96, and not amendable after verdict, because it would be another title. 1 Mod. 250, 252. Carth. 401. S. C. Andrews 208. Comb. 394. Cases B. R. 125.

EJECTMENT. Verdict was *pro quer.* and now he moved to amend his declaration, wherein he had counted of a demise, 10 April 1697, instead of 1696; for 97 was not come at the time of the trial. And the Court agreed, that in a judgment by confession on a warrant of attorney, it had and might be amended in ejectment, because without such amendment the agreement and intent of the parties could not be fulfilled; but denied it in the principal case, because it altered the issue and made another title (a).

(a) *Vide* 2 Bl. Rep. 940.

7. Child *versus* Harvey.

[Mich. 11 Will. 3. B. R. 1 Ld. Raym. 511. S. C.]

Carth. 506. In the distringas the day of nisi prius was appointed after the day in bank, and after verdict held not amendable by the plea-roll, because the Judge's authority was confined to that day. Cases B. R. 274. S. C.

* [49]
Where the nisi prius roll may be amended by the plea-roll, and where not.

A Scire facias on a recognizance; upon issue *non solvit* it was found (b) for the plaintiff. Mr. Northey moved to set aside the verdict, because in the *distringas* and *jurata* the return was *à die Sanctæ Trin. in tres Sept. nisi Johannes Holt mil. 27 die Junii prius venerit*, the twenty-seventh day of June, being the morrow after *tres Trin.* But the plea-roll was right, for the award there was *tres Mich.* It was agreed on all sides that the trial must be set aside unless the mistake could be amended, because it appeared the Judge had no authority to try the issue, * and the Court held that it could not be amended. The Court agreed that where the *distringas* or *jurata* are right, and the amendment does not alter the point in issue, the *nisi prius* roll may be amended by the plea-roll. So it was in the Bishop of Worcester's case, *ant.* 48. and there the *distringas* and *ju-*

(b) By 5 G. 2. c. 13. where any verdict hath been or shall be given in any action, suit, bill, plaint, or demand, &c. the judgment thereupon shall not be stayed or reversed for any defect or

fault either in form or substance, in any bill or writ original or judicial, or for any variance in such writs from the declaration or other proceedings.

rata

rata were right. 2 Cro. 353. Dy. 260. Hub. 81. 1 Cro. 6 Mod. 164, 595. But here neither *diffingas* nor *jurata* are right. 276. 2 Salk. 699. Ante, pl. 5. 2 Roll. Rep. 152. Hob. 310. The day appointed for the *nisi prius* is impossible; and the Judge's authority is confined to the day. He has no authority to try, *nisi Johannes Holt, &c.* 27 Junii prius venerit; which cannot be. Where a Judge's authority is confined to a day, his trial at another day must be without authority (a).

(a). See 1 Wilf. 144.

8. Anonymous.

[FHM. 11 Will. 3. B. R.]

THE clerk of the treasury of the Common Pleas attended with the record here, and it was moved that the transcript in B. R. might be amended by it. Hall opposed it, till they had the costs of the writ of error allowed them. *Ex per Holt* Chief Justice, You should have insisted for the costs in C. B. before the party had liberty to amend. This way of amending the record here by the record there, is the course of the Court, and only to save a *certiorari*; for if the record be right below, upon diminution alleged, the party may have a *certiorari* of common right. Therefore these amendments cannot be opposed; nor did I ever know it done, being only to save the charge of a *certiorari* (b).

In case of amendment of record in B. R. by the record in C. B. the costs (if any) must be given below. The rule in C. B. is to give costs if the writ of error is waived, but not else. Vide 1 Lill. 67.

(b) Vide 1 Wilf. 303.

9. Thompson versus Crocker.

[Pas. 12 Will. 3. B. R.]

NORTHER moved to amend a writ of error, which recited a judgment given *in curia* of the king, when it should be *in curia regis & regine*; the cursitor's notes were right, and the misprision only in matter of form and not skill: *Sed non allocatur**; for first, the writ is a good writ; there is no fault in the writ, only it does not agree with the record; and the amendment is to make a new writ. 2dly, The 8 H. 6. impowers us to amend in matters precedent to the judgment; but not to amend the writ of error. The intent of the statute was to amend in support of original judgments, and to avoid writs of error;

Variance between writ of error and record, refused to be amended, though the cursitor's note was right. 5 Mod. 69. 1 Sid. 54, 107. Styl. 117. Cro. Jac. 429. 1 Bull. 204. Poph. 196. 3 Lev. 344, 345

* A writ of error is now amendable by the Stat. 5 Geo. 2. ch. 13. sec. 1. Note to 5th edit.

Court cannot
amend their own
commission.
Cases B. R. 369.
S. C. Skin. 367.

but this may be to make an amendment to make good the writ of error, and to reverse the judgment. And it is the more absurd, because the writ of error is the commission to the Court, and a Court cannot amend their own commission.

[50]

10. Anonymous.

[Trin. 12 Will. 3. B. R.]

Ante 47. A-
mendment of in-
formation with-
out costs. 1 Lev.
189.

SIR *Bartholomew Shower* moved to amend an information of forgery in ten places, and though opposed, the motion was granted, because it made no alteration of the fact; and that without costs or imparlance.

11. Cox *versus* Wilbraham.

[Pas. 13 Will. 3. B. R. 1 Ld. Raym. 668. S. C. by the name, Fox *versus* Wilbraham.]

Amendment
cannot be on de-
murrer after en-
try on the roll.
Cro. Car. 386.
1 Sid. 54. 14
Ed. 3. c. 6.
3 Lev. 39. Hob.
127. Mod. Cases
165. Holt 55.
S. C.

COVENANT; and assigns breach upon the words *that he had not made, done, or suffered* any act or thing whereby to encumber, &c. And the breach was *quod ad sessionem cessaria tent. &c. anno quarto Jacobi secundi utlagat. fuit.* Defendant demurred; and upon argument the declaration being held naught, for uncertainty when or what term the outlawry was had, Mr. *Chefbire* moved to amend. He cited 1 Cro. 147. which was after verdict, but said, as to this matter, there was no difference between verdict and demurrer; for the words of the act of E. 3. are challenge of the party; which must be meant demurrer. *Sed per Holt C. J.* No; the statute means the party's exception in arrest of judgment. If the defendant had pleaded a plea to the right, or in abatement, it might be reasonable to allow an amendment; but to amend upon demurrer, when this may be the cause of the demurrer, would be to ensnare the defendant without cause. *Ergo disallowed (a).*

(a) The practice is now to permit the party to amend, on payment of costs.

12. Lepara *versus* Germain.

[Pas. 2 Ann. B. R. S. C. 2 Ld. Raym. 859.]

Bill against J. G.
Kt. pl. in abate-
ment that he is
knight and bar-
onet, and denied
to be amended.

ASSUMPSIT; and declares *versus* Sir *John Germain* Kt. The defendant pleaded in abatement, he was a Knight and Baronet; the plaintiff replied he was a Knight, &c. and *Raymond* moved to amend upon pay-
ment

Amendment.

50

ment of costs, all being in paper, and that the action being by bill, the addition was not material, not being within the statute of additions: but denied to amend, because nothing to amend by, and the defendant had taken advantage of the fault (a).

2 Salk. 451.
Anne 3, 47.
Salk. 235. S. C. 3.
Holt 493.
2 Ld. Raym.
1178.

(a) In *Garner v. Anderson*, 1 Str. 11. the Court allowed the plaintiff in replevin to amend the declaration by altering the place of taking from A. to B. after the defendant had justified taking in B. and traversed taking in A. *King v. Steward*, 2 Str. 739. Defendant, in an information, having pleaded a different addition in abatement, the Court allowed an amendment. *Resington v. Governors of Farnworth School*, 2 Wils. 118. Leave given to amend declaration, after variance pleaded between writ and count. *Barnes* 5. Defendant sued

as administrator, pleaded he was not administrator; plaintiff allowed to amend by declaring against him as executor. *Queen v. Borough of Malmesbury*, 1 Crompt. Prac. 108. (where all the preceding cases are inserted). The name of a corporation amended after a plea in abatement. All amendments are upon payment of costs. In *Richards v. Brown*, Doug. 114. a warrant of attorney variant from the declaration was amended after error brought, and variance assigned for error.

13. *Parsons versus Gill*.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 895. S. C.]

IN debt upon a *mutuatus*, the judgment was entered up as of Hil. Term 1700, whereas the borrowing appeared to be 2 April 1701. Error being brought to reverse this judgment, * Mr. Ward moved to amend the judgment by the paper-book signed by the master, which was the 2 Januarii 1700. *Et per Cur.* This was allowed to be amended, for it is but a slip of the clerk, who should have perused the paper-book signed by the master, which is authentic enough to amend by. *Vide* 1 Cro. 147. *Hob.* 127: 1 Brownl. 16.

Plea-roll amended by the paper-book signed by the master. Post 88.

* [51]

Mod. Cases 165.
Vide Doug. 109.

14. *The Queen versus Tutchin*.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1061. S. C.]

INFORMATION for a libel. The defendant was found guilty; and it was moved in arrest of judgment, that the *ven. fac.* was returnable *die Lunæ prox. post tres Sept. Sancti Mich.* and that the *disfringas* and *nisi prius* on the roll was awarded in common form right enough; but that the writ of *disfringas* was tested 24th October, whereas the *venire* was returned the 23d. And this was held to be a discontinuance; but the question was, whether

Vehire ret. 23 October. *Disfringas* test. 24. a discontinuance, and not amendable. *Yelv.* 205. *Cro. El.* 433; 572. *Cro. Car.* 311, 312. No difference as to amendment be-

tween cases civil
and criminal at
common law.

1 Lev. 2.

1 Danv. 335.

1 Sid. 148, 259.

14 E. 3. & 8 H.

6. The only

statutes of a-

mendments.

The others are

statutes of jeo-

fails. 1 Sid.

229. 1 Keb. 718,

305. 6 Mod.

164, 268, 270.

1 Lev. 143.

3 Lev. 430.

5 Mod. 398.

Holt 414. 5 S.

T. 532.

ther it might not be amended? It was argued, it might be amended, and that it was amendable first at common law. 2dly, By the statute of *H. 6. 2.* 2 *Cro.* 529. *Cro. Car.* 144. 1 *Sid.* 244. *Dy.* 346. 14. 1 *Sid.* 259. 4 *E.* 3. 9. 3 *Lev.* 14. 430. 2 *Bulst.* 35. *Ray.* 440. 1 *Sid.* 243. 66. 1 *Keb.* 191. 215. 1 *Roll. Abr.* 201. *Cro. El.* 572. *Et per Holt, Powell, & Powys.* 1st, Whatever at common law might be amended in civil cases, was at common law amendable in criminal; and so it is at this day. 2dly, This was not amendable at common law, because it would warrant a trial that was tried without authority, and the amendment would be contrary to the truth of the fact. And it is a mistake of the clerk in skill, and though a mis-awarding of process on the roll might be amended at common law the same term, because it was the act of the Court; yet if any clerk at common law issued out an erroneous process on a right award of the Court, that was never amended in any case at common law. 3dly, They held this not to be amendable by any statute of amendments. And *Powell* said, There were only two statutes of amendments, the 14 *E. 3.* and 8 *H. 6.* the rest he reckoned to be statutes of jeofails, and not of amendments. And he held that the 8 *H. 6.* was only to enlarge the subject-matter of 14 *E. 3.* and that the 14 *E. 3.* extends only to process out of the roll, *i. e.* writs that issue out of the record, and not to proceedings in the roll itself; but that the 14 *E. 3.* extends not to the king, because of these words *challenge of the party*. And the 8 *H. 6.* has been always construed in imitation of the act of *E. 3.* And the exception in the statute of *H. 6.* was only *ex abundanti cautela*. And all judges and sages of the law in all ages have taken it not to extend to the Crown. And the cases on the other side are not to be relied upon (a).

[52]

(a) *Vide Stat.* 5 *G. 2. c. 13.* cited *ante*, p. 48. in note to *Child v. Harvey*.

15. Buckfom *versus* Hoskins.

[*Mich.* 3 *Ann. B. R.* 2 *Ld. Raym.* 1057. *S. C.*]

6 *Mod.* 263,

320. *Scire facias*

variant from the

judgment not

amendable after

nul tiel record,

the writ being

not vicious in fe.

6 *Mod.* Cases

263, 284, 286.

3 *Salk.* 32. *S. C.*

Holt 58, 762.

ERROR of a judgment in *C. B.* and the *scire facias* to assign errors was *quare executionem habere non debet* of a judgment in ejectment for two messuages; whereas the recovery was *de uno messuagio* only: the plaintiff in error pleaded *nul tiel record*, and the defendant moved to amend. He cited 1 *Cro.* 162, 163. 1 *Ro.* 197, 797-22 *E.* 4. 6. 2 *Cro.* 373. *Cro. El.* 760. 2 *Sid.* 7, 12. *Et per Holt C. J.* Nothing appears to be vicious or informal to need an amendment, and there may be a good judgment

judgment that agrees with it. The writ is good, though improper for the purpose, and we cannot put a deceit upon the defendant, and make his plea false when it was true. *Cro. Ja.* 372. was said to be a strained case.

16. *Vavafor versus Baile.*

[Hill. 6 Ann. B. R.]

SCIRE *facias* on a judgment, and by mistake in the *scire facias* the plaintiff's name was put for the defendant's, *scil. Radulphus* for *Jacobus*; and they moved to amend, it being the fault of the clerk: Denied; for the writ does not appear to us to be wrong, and there may be such a judgment for ought we know.

Variance between *scire facias* and judgment, not amendable. 8 Co. 161. Br. Amend. 112. 1 Danv. 333. pl. 25. Holt 59. S. C.

17. *Inter Lord Pembroke and Lord Jeffereys, coram Holt C. J. & al. upon a Reference from the House of Lords.*

LORD *Pembroke* petitioned the House of Lords for a bill to set aside an amendment made of a fine and common recovery in the grand sessions in *Wales*, whereby he had lost the benefit of a writ of error: And whether the fine and recovery were amendable in the said particulars, and the said amendments warranted by law, was referred to the Judges. One was, whereas the writ of covenant was tested six months after the *Dedimus* for the caption, the Court of grand sessions had amended it. *Et per Holt & al.* it was certified, That the writ of covenant being an original, was not amendable either by the common law or by any statute: That neither the 14 E. 3. nor the 8 H. 6. warrants such an amendment: That there is no difference as to this purpose between actions amicable and adversary; for nobody pretends to mend a mistake in a deed itself, and yet *that* surely is as much a common assurance as a recovery, and that *Gage's* case, 5 Co. 45. * is misreported, and not law. Hereupon a bill was allowed, but was thrown out in the House of Commons (a).

Writ of covenant not amendable by common law or statute. 2 Salk. 702. Holt 59. S. C. 2 Ld. Raym. 1066.

[53]

Amicable action, no more amendable than adversary. *Mr d.* 571. *Noy* 171. *Co.* Ent. 244, 252. 3 *Cro.* 740. * Lord Ellesmere observes on *Coke's* 5 Rep. That the record being viewed, warranteth no such report.

(a) *Vide* 3 *Wils.* 58, 154, 249. *Rep.* 102, 816, 1013. *H. Bl. Rep.* 24. *Ld. Raym.* 134. 2 *Wils.* 209. 2 *Bl.*

18. Bold's Case.

Verdict general or special may be amended by the clerk's notes in civil cases, but not in criminal. Ante, pl. 4. 8 Co. 159. Cro. Car. 338. Hob. 184. 1 Rol. Rep. Lit. Rep. 61. Ante 47, pl. 4. 1 Wilson 33.

A Verdict general or special may be amended by the notes in the book of the clerk of assize, if there be a misprision: But this is to be intended in civil and not in criminal cases. *Vide Keil.* 1. 3 Cro. 149. In *assumpsit*, defendant pleaded payment for part, and *non assumpsit* for the rest; and the Jury found for both, *quod non assumpsit*, whereas for one it should be *non solvit*; and the record was delivered to the clerk of the assizes to amend, because it was his misprision; it appearing, the Jury found both issues for the plaintiff. 3 Cro. 149, 150. Cro. Car. 145, 338. 4 Co. 52. 2 Cro. 185. A special verdict has been amended by the notes of counsel in the entry; and that after a writ of error brought; for *per Cur.* It is but what was found, and we may amend here what they might in *Com. Banco* (a).

Nota. Amendment shall not be made, after the Court cannot help seeing that the matter is upon record, (as giving leave "to withdraw a demurrer and plead to issue," after other issues joined in the same cause have been tried, and verdicts formed with contingent damages;) for the whole must be supposed to be still in paper. 1 Bur. 322. *Vi.* 1 T. R. 782. 2 T. R. 707.

(a) In *Newcombe v. Green*, 2 Str. 1197. a verdict was amended by the Judges' notes, the officer having entered 1 s. damages instead of 275 l. In *Maye v. Archer*, 1 Str. 513. a *ven. de nov.* was moved for, on affidavit that certain material facts, not stated in the special verdict, were proved at the trial; but the Court directed the verdict to be amended. In *Eddowes v. Hopkins*, Doug. 375. a declaration consisted of several counts; and, after a general verdict, a motion in arrest of judgment being made on the ground of their inconsistency, the Court allowed the *postea* to be amended by the Judges' notes, and applied to particular counts. Lord Mansfield mentioned the case of one *Gilson*, who was convicted of robbery; and a mistake being discovered in the verdict, it was, on consultation with all the Judges, corrected from minutes signed by the jury, and the prisoner executed. *Bulwer J.* said, If there was only evidence on the good and consistent counts, the

verdict might be amended by the Judge's notes, otherwise if there was any evidence applicable to the other counts, *verdict amended in B. R.* by applying damages to a particular count, according to the Judges' notes, after error brought in the House of Lords, and an assignment for error that the counts ought not to be joined, and a day for argument appointed in the House of Lords. *Petrie v. Hannay*, 3 T. R. 659. Plaintiff, *q. t.* cannot, after applying a general verdict to one count, upon that appearing insufficient, resort to another. *Halloway v. Bennett*, 4 T. R. 448. In *Cogan v. Edden*, 1 Bur. 383. the Court were of opinion, that a verdict might be amended on the affidavit of eight of the jury, that it was given contrary to their intention, by mistake of the foreman; and it appearing on the Judge's report that the weight of evidence accorded with their intention. *Vide* 1 Wils. 33. Doug. 746. 5 Bur. 2661. Lord Mansfield observed, in the

the case of *Alder v. Cbip*, 2 Bur. 755. That the Court had not used the same strictness of late years, with regard to amendments, as they formerly did, and it was much better for the parties that they should not. However, the Court would always take care that if one party ob-

tained leave to amend, the other would not be prejudiced or delayed thereby. In that case the plaintiff had, by mistake of his former attorney, traversed a lease under which he claimed, and had leave to withdraw his replication, and reply *de novo*.

Amerciaments and Fines.

[54]

1. Lord Gerrard *versus* Lady Gerrard.

[Hill. 7 Will. 3. B. R. 1 Ld. Raym. 72. S. C.]

IN *dower*, defendant confesses as to part, and judgment is given against him, *quod fit in misericordia*; and as to the rest he pleads in bar; upon which there is a demurrer, and judgment is given against him, *quod fit in misericordia*. And it was objected in error, that a man ought not to be twice amerced in the same action. *Sed non allocatur*: For both the judgments are final and independent of one another. 5 Co. 58. *b. aliter*, where one judgment is only interlocutory, and depends upon another, as *quod computet* in account.

5 Mod. 67. 3
Lev. 401. Post
253. Lev. Ent.
76. Defendant
may be amerced
twice in the
same action,
where there are
two final inde-
pendent judg-
ments. 8 Co.
61. a. 2 Leon.
4, 5, 185, 186.

2. Linsey *versus* Clerk.

[Mich. 8 Will. 3. B. R.]

IN trespass, assault, and battery, &c. there can be no *capia- tur pro fine* entered since 5 & 6 W. & M. but the plaintiff is to have 6s. 8d. in the costs to pay so much to the king for the fine. Before this act, when the fine was pardoned, the judgment was entered *nihil de fine quia pardonatur*. So it is now in C. B. upon this statute, for they enter their judgments *nihil de fine quia remittitur per stat.* But in B. R. judgment is entered up without any notice taken of the fine; for the law is altered and taken away in

3 Mod. 285.
No judgment
entered pro fine
in trespass in
B. R. since sta-
tute 5 & 6 W. 3.
Carth. 390.
S. C. Comb. .
387. Cases B. R.
101.

Amerciaments and Fines.

effect by this statute. Therefore not like the case of a pardon; for that does not alter the law, but excuses the party.

3. *Eyres versus Smith.*

[Mich. 9 Will. 3. in Scacc. At Serjeants-Inn.]

Estreates discharged, upon motion in the Exchequer.

[55]
1 Lill. 70, 71.

EYRES sued a writ out of *C. B.* versus *Smith*, directed to the sheriff of *York*, who sent a warrant to *Simpson* the bailiff of the liberty of *Pomfret*, who did not return the writ; upon which he was amerced 50*l.* (*viz.* time after time) and that was estreated into the Exchequer. Afterwards *Eyres* and *Smith* agreed, and upon producing a certificate from the attorney for the plaintiff that the debt was satisfied, these amerciaments were discharged upon motion to the barons. Note, There ought to be a *conflat* of the estreates, and, as the clerks said, the Court uses not to discharge the amerciaments, but allow you to compound them.

4. The King *versus* The Mayor of Hertford.

[Mich. 11 Will. 3. B. R.]

Issues never estreated by special rule unless in extraordinary cases. 1 Lill. 89. Post 374. S. C. 376. Holt 320. Carth. 503.

IN an information in nature of a *quo warranto*, issues were returned upon three several *distingas's*. Mr. *Ward* moved for a rule to estreat them. *Et per Holt* Chief Justice, If it be an extraordinary case, we can make a rule to estreat the issues; but otherwise, the course of the Court is to send them up into the Exchequer at the usual times, which are twice a year, *viz.* the last days of the two issuable terms. But there is nothing extraordinary in this case. And the motion was denied.

5. The Queen *versus* Summers.

[Pas. 1 Ann. B. R. 2 Ld. Raym. 854. S. C. but only in the second Point.]

Costs taxed upon a *certiorari* are to be only the costs in B. R. Prosecutor cannot move to aggravate the fine after accepting his costs. 3 Salk. 104. S. C.

INDICTMENT for a trespass and riot; defendant pleaded *non cul.* and the indictment was removed hither by *certiorari*, &c. The defendant went before the Master, and costs were taxed; and now Mr. *Eyre* moved he might go before the Master again, that the prosecutor might be considered for his charges below, the Master's taxation before being only for costs since the *certiorari*. *Es per Cur.* The Master ought not to consider the costs below,

low, but only since the *certiorari* and upon it; then Mr. *Eyre* moved to aggravate the fine: *Es per Cur.* You ought not to aggravate the fine after the party has been before the master; if you do, we will set aside the taxation of costs (a).

(a) *Vide 2 Hawk. P. C. 6 ed. p. 415. contra.*

6. The Queen *versus* Templeman.

[Trin. 1 Ann. B. R.]

UPON a motion to submit to a small fine, after a confession of the indictment which was for an assault, *Holt* Chief Justice took a difference where a man confesses an indictment, and where he is found guilty; in the first case a man may produce affidavits to prove *son assault* upon the prosecutor in mitigation of the fine; otherwise where the defendant is found guilty; for the entry upon a confession is only *non vult contendere cum domina regina & pon. se in gratiam Curie.*

Defendants may submit to a fine, though absent, if they have a clerk in Court that will undertake for the fine. *Hill. 2 Ann. Hickeringil's* case was, that he and his daughters were indicted for a trespass, and *Hickeringil* only appeared on the motion to submit to a small fine. But where a man is to receive any corporal punishment, judgment cannot be given against him in his absence, for there is a *capias pro fine*; but no process to take a man and put him on the pillory. *Vide tit. Judgments,——Duke's case.*

Upon submitting to a fine after confessing indictment, affidavits may be read to prove that the prosecutor made the assault; otherwise after conviction. *Farr. 40. S. C. 3 D. 253. p. 7. S. C.*

[56] Judgment for a fine may be given in the defendant's absence, upon an undertaking by a stranger, but not for any corporal punishment.

7. Brook *versus* Hustler.

[Hill. 4 Ann. B. R.]

Vide Record, page 768.

DEBT for an amercement in a court-leet. It was laid in the declaration, That the defendant was amerced *per Cur.* not saying in what sum, and that it was assessed by assessors to such a sum. It was objected that the Court ought to impose a sum certain; and *that*, by assessors, is after to be mitigated. *Vide Hob. 129. Lev. 206. Sed Cur. cont.* The amercement ought to be general, *quod sit in misericordia*; and *that* is to be ascertained by assessors (b).

Amercement may be general *quod sit in misericordia*, and assessed to a certain sum. *Show. 62. R. & Entr. 553. Hob. 122. Rep. A. Q. 76. S. C. Lex. Man. Ap. 19.*

(b) *Vide ac. And. 47.*

Ancient Demesne.

Vide Record,
page 774.

1. Baker *versus* Wich.

[Mich. 3 W. & M. B. R.]

Ancient demesne, how pleadable. If manor is ancient demesne, lands held of the manor impleadable in the lord's court only; parcel in the king's court, and not the lord's. Post 186. Show. 271. Bro. Anc. Dem. 6. 3 Lev. 405. Styl. 197. Comb. 186. S.C. 3 Salk. 34. Cases B. R. 13. 2 Burr. 1047, 1048.

IN ejectment, defendant pleaded in abatement (*a*), that the lands were *parcel* of the manor of *Bray*, and that the manor of *Bray* was ancient demesne held of the crown. And this was held naught *per tot. Cur.* For hereby it must be understood the lands in question are part of the demesnes; and supposing the manor to be ancient demesne, yet the manor and the demesnes of the manor are impleadable at common law, and not in the lord's court; for then the lord would be judge in his own cause. On the other side, ancient demesne lands held of the manor are impleadable in the court of ancient demesne, and there only. *Vide F. N. B. 11. m. 1 Ro. 324.* And therefore, because he does not plead that these were lands *held* of the manor of *Bray*, judgment *quod respondeat ouster*.

(*a*) This can only be pleaded by leave of Court upon a full affidavit of the fact—affidavit that the lands are ancient demesne, and holden of the manor of *A.* not alleging that the manor itself is ancient demesne, is insufficient. If it does not appear that

the lessor of the plaintiff claims a freehold, the plea will not be allowed, for a term of years is not recoverable in the court of ancient demesne. That court is very much disapproved of; *per Curiam*, 2 Burr. 1046.

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2. Hunt *versus* Burn.

[Hill. 12 Will. 3. B. R. Comyns 93. S. C. Post. 244, 339.]

Tenants in ancient demesne are free as to their persons, but not as to their estates. 3 Salk. 34. S. C. Holt 60.

BRAC^TON calls these tenants *villani privilegiati*, and it seems they are free as to their persons, not as to their estates; for if ancient demesne be to be tried, the issue is, Whether ancient demesne or frank-fee? The privilege arises from the constitution and nature of the thing coeval with the government itself, at least as ancient as any other estate or tenure whatsoever; we must suppose these privileges commenced by act of parliament, for they cannot

cannot be created by grant at this day ; *per Holt Chief Justice.*

If you plead that the manor of D. is ancient demesne, you ought to aver it by the record of Doomsday, for that is the trial of it : But if you plead, that such a place is parcel of a manor which is ancient demesne, then you ought to conclude to the country ; for parcel or not parcel is triable per pais, 2 E. 3. 15. b. Thomas de Grenham's case : But it seems to me the other side may traverse its being ancient demesne. And so was done between Saunders and Welch C. B. Pasch. 9 Jac. Rot. 3165. Issue was, Whether the manor of Otterbury was ancient demesne ? And the Court awarded, quod querens habeat recordum libri de Domeſday hic in octabis Hillarii. At the day the plaintiff had the book brought in by a porter. It appeared by the book, that Edward the Confessor, anno regni sui decimo octavo, had given this manor Abbati Rotononensi : and that this manor was not in the title of de terra regis ; for all lands held in ancient demesne, which the Confessor had, were by William the Conqueror, anno regni sui viceſimo, written in the book called Doomsday, under the title de terra regis ; and these are all held in ancient demesne at this day ; but those which were given away by Edward the Confessor, and which are not written in the book called Doomsday, under the title de terra regis, are not ancient demesne. And a respondeas ouster was awarded.

Issue of ancient demesne how triable.

Ancient demesne is the land under the title de Terra Regis in Domeſday Book, and no other. F. N. B. 98. a. Fitz. Ancient Demesne 12.

By a recovery of the land at common law, it becomes frank-fee for ever ; but a recovery against the tenant is reverſable by the lord, by writ of deceit ; and such a recovery makes it only frank-fee, quamdiu it continues unreverſed : but when it is reverſed, it becomes ancient demesne again. Vide 5 E. 3. 61. 4 Inst. 270. Moor, pl. 285.

By recovery at common law it becomes frank-fee. 21 Edw. 3. 46. b. F. N. B. 19 D.

Annuitv. Pension.

[58]

1. Anonymous.

[Trin. 7 Will. 3. in Scacc.]

THE king cannot grant an annuity, for his person is not chargeable as the person of a subject ; but if he grant it out of his excise, or any branch of his revenue, it is good ; for there is somewhat therewith chargeable. *Per Barones Scaccar.*

King cannot grant an annuity. F. N. B. 152. K. Dyer 92. b. Plowd. 192. a.

2. Smith *versus* Wallis.

[Pasch. 12 Will. 3. B. R. 1 Ld. Raym. 587. by the name, Smith *versus* Wallatt. S. C. but not S. P.]

Pension issued out of an appropriation by prescription, suable in the Spiritual Court. Vide Prohibition. 1 Cro. 675. 1 Mod. 218. 1 Vent. 3, 120, 265, 335. 2 Vent. 239. Com. Dig. 3d ed. vol. 6. p. 129. Prohibition G. 11.

A Pension out of an appropriation, though by prescription, is suable in the Ecclesiastical Court, for it could not begin but by the grant and institution of spiritual persons. And therefore if the duty be traversed, it may be tried there; *per Holt* Chief Justice, upon a motion for a prohibition. Vide 1 Vent. 120. 3 Cro. 675. Where it is a pension by ordinance of the bishop acting as judge; *ordinamus & constituimus*; and where by concurrence of the bishop co-operating with the patron, Vide N. Br. 52. Reg. 47. 3 Cro. 810. the church itself charged. 1 Inst. 266. such annuity cannot be released to the ordinary because it is temporal (a).

(a) Vide Str. 878.

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Appeal (a).

1. Orbet *versus* Ward.

[Mich. 1 W. & M. B. R. Intr. Hill. 3 & 4 Jac. 2. Rot. 1018.]

Shew. 47. 3 Mod. 266. Nul tiel parish is a good plea in appeal. Carth. 54. Comb. 139. Holt 61. Trem. 27.

APPEAL of murder for killing her husband, against the defendant, *nuper de parochia Sancti Jacobi Westm.* in com. Mid. gen. The defendant in propria persona venit, and cravesoyer of the writ and return, and then *per A. B. attorn. suum* pleads in abatement, that there is a parish named St. James within the liberty of Westminster; but no parish named St. James Westminster only: To which it was demurred, and the cause was adjourned till next term, when it was adjudged for the defendant. For first, the demurrer confesses the matter pleaded in abatement, viz.

(a) Vide 5 Bar. 2643. where the practice on appeals appears very much at length. Vi. also 5 Bar. 2798.

That

That there is no such parish, which is a good plea. 2dly, The plea being by attorney, ought not to have been received; and though it is received, yet it was wrong, and therefore void. The consequence is, that the cause is discontinued by the adjournment.

In appeal defendant cannot plead by attorney. 1 Lill. 79. Post. 62.

2. Wilson *versus* Laws.

[Trin. 6 W. & M. B. R. 1 Ld. Raym. 20. S. C.]

WILSON brought an appeal of murder against *John Laws* for killing his brother *Robert Wilson*, and declares against the defendant, for that he in *parochia Sancti Egidii in Campis*, (such a day,) *circa horam primam post meridiem ejusdem diei*, did assault, &c. & in & super *superiorem partem ventris juxta pectus & medium corporis percussit, pupugit, & inforavit dans ei vulnus mortale, &c.* Defendant craved over of the writ of appeal and the return, and then demurs in abatement, and pleads over to the felony. After several exceptions taken to the return were over-ruled, Justice *Giles Eyre* held, That if the return had been naught, the defendant's appearance could not have helped it; for appearance helps only when the party comes in and pleads to issue, not when the party comes in and challenges the process upon the account of its defect. *Vide* 1 Ro. 789. *Bul.* 142. 2 Cro. 284. *Yelv.* 204. After this several exceptions were taken to the declaration. Upon which it was ruled *per Cur.* 1st, That *circa horam primam* was as certain as can be; for the law does not tie a man up to an exact minute. 2dly, That the description of the wound in *superiorem, &c.* could not be more certain. 3dly, That *percussit, pupugit, & inforavit dans ei mortale vulnus*, was better and more certain than if it had been *et dedit*, as the other side would have had it. 4thly, That the fact is well alleged in a parish, though the statute of *Gloucester* requires the vill should be set forth; for the parish shall be intended a vill; and though there may be more than one vill in a parish, that shall never be supposed. And therefore if the case happens to be so, it must come of the other side to shew it. 1 *Hust.* 125. *b.* Judgment to answer over.

4 Mod. 290. Post. 589. Appeal of murder, defendant demurs in abatement. Cro. El. 196, 495. Stam. 98. b. 1 Bulst. 143. Erroneous process is aided by appearance, where the party comes in and pleads to issue; otherwise, where he challenges the defect. 9 H. 5, 2. 1 Vent. 7. Show. Rep. 320. Stamf. 1. Skin. 443, 549, 551. Comb. 293. Carth. 331. 3 Salk. 380. Holt 62. Rep. B. R. Temp. Hard. 369.

* [60]

What is sufficient certainty in count in appeal. 1 Bulst. 80, 82. 2 Inst. 317, &c. Parish shall not be intended to contain more than one vill. Carth. 17.

N. B. *The case of Widdrington versus Charleton*, Trin. 11 Ann. In appeal adjudged contra upon this point, per Parker C. J. Powys & Eyre contra Powell.

3. *Armstrong versus Lisle.*

[Hill. 8 Will. 3. B. R.]

Appeal of death
by bill exhibited
at the sessions of
gaol-delivery,
and removed in-
to B. R. by cer-
tiorari. Skin.
67c. S. C.
Comb. 410.
Kely, 89, 93.
Carth. 394.
Cases B. R.
108, 109, 157.
Holt 63.

LISLE was indicted at the sessions of gaol-delivery for the county of *Cumberland*, for the murder of *Richard Armstrong*, and was thereupon tried and convicted of manslaughter. Immediately after the verdict *John Armstrong*, brother of *Richard*, put into court a bill of appeal of murder, and prayed by his counsel that it might be received and filed, and that the defendant might be thereupon arraigned. But before the appeal was arraigned, *Lisle* demanded the benefit of his clergy: And then the bill of appeal was by the appellant's counsel read in open court, and *Lisle* appeared to it and prayed to be bailed, but refused to plead; upon which he was remanded to gaol *quousque*, &c. This whole proceeding was entered upon the record of the indictment, together with the conviction of manslaughter, and returned into *B. R.* upon a *certiorari*, and the appeal was also returned, but upon the record of that no mention was made of any proceeding. *Lisle* was also brought up to the bar by *habeas corpus*, the return whereof being read, the appellant moved for a copy of it. *Et per Curiam*, It must be first filed, for it is not before us till filed, and we can order nothing concerning it till it is before us.

Being filed, the appellee prayed his clergy: to hinder which the appellant took exceptions to the indictment, conviction, and trial. *Et per Cur.*

Post. 447.

This is the king's record, in which you cannot assign errors: You are a stranger; and perhaps the prisoner has released these errors to the king; and you have no warrant of attorney filed, and ought not to speak or be heard in the cause.

Nevertheless he was not admitted to his clergy this day, and it was moved he might be bailed; but the appellant opposed that, unless he might be permitted to arraign the appeal, or unless the appellee would give bail to the appeal; for if he should get at large before the arraignment of their appeal, they could have no process against him to bring him in again, and so the appeal would be lost.

Et per Cur. An appeal by bill is always against one in *custodia*, and he must be in custody, or else you cannot arraign him.

Then they urged, he ought not to be bailed, because he was found guilty of manslaughter, and no clergy allowed.

Sed per Cur. Justices of *eye* and *terminer* cannot bail in such case, but this Court may do it at discretion.

Accordingly

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2 John. 222.
1 Roll. Rep.
202.

The King's
Bench may bail
one convicted of manslaughter.

Accordingly he was bailed generally on the crown-side to appear *de die in diem*.

At another day Mr. *Solicitor General* prayed judgment for the king against the prisoner on the indictment: And the defendant being asked, what he had to say why judgment should not pass against him, prayed his clergy.

Et per Cur. Had the defendant prayed it at the session of gaol-delivery, it could not have been denied him there: Now he is here, we cannot give judgment against him without asking what he has to say why judgment should not be given: Nor can we deny him here what could not have been denied him there. Hereupon his clergy was allowed him, and he was tried by the ordinary of —, who gave him a psalm to read, whereof he read the first verse: And then Sir *Samuel Astry* asked the ordinary, *Legit vel non?* who answered, *Legit*. Whereupon the executioner burnt him without the bar on the brawn of the left hand, and then the appellee prayed to be discharged.

Sed per Cur. You must still stand upon your recognizance, and if you would discharge the appeal, you must sue a *scire facias* against the appellant, and, if he doth not appear, nonsuit him. Hereupon a *scire facias* was taken out returnable at a common day: And no return being made by the sheriff, the prisoner moved again to be discharged.

Sed per Cur. You must take a new day, and procure a return, unless you can get the appellant to appear *gratis*, as he may if he pleases; and accordingly the appellant did appear.

And now it was questioned, Whether the appellee ought to be arraigned again on the bill of appeal. *Et per Cur.* The appellant must arraign the appellee *de novo*, but is not to make a new count; for the arraignment is no commencer but a revivor thereof, like a re-summons. *Vide 2 Ro. Rep. 478.*

Upon this the appeal was arraigned in *French* by the appellant's counsel, who read the count, and therein the word *wound* was used, which *Holt C. J.* took notice of and disliked, not being *French*.

And now the clerk of the crown going to arraign him likewise, it was objected by the appellee's counsel, That the appeal being commenced before justices of *oyer and terminer*, and not by them determined, was therefore discontinued, and so no appeal depending: And that this objection came in proper time now; lest they might, by the arraignment being completed, be estopped.

Sed per Cur. Though the appeal was *sine die*, yet it was not discontinued, and the return of the *certiorari* makes a continuance, and is sufficient to continue it against the prisoner.

Then

Co. Entr. 355.
Poß. 103.

3 Bull. 113.
Styl. 371.

Arraignment of
appeal.

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Appeal put sine
die, and not dis-
continued.

Then it was questioned, On what side the appeal should be arraigned? *Et per Cur.*

A civil cause is always on the plea-side, unless it come in by attachment. And Mr. *Aston* said, Appeal, whether by writ or bill, was always arraigned in *English* on the plea-side, unless it came in by *certiorari*; for then it was on the crown-side.

Accordingly it was ruled in this case, but not to make a precedent.

And now it became a question, How the appellant ought to appear and prosecute? *Et per Cur.*

Must be commenced in person. 2 Jones 310. Post. 64. Show. Rep. 47.

Every appeal must be commenced in person, but may be prosecuted by attorney, unless where wager of battail lies; in such case he must commence in person and prosecute in person also. But where there is no wager of battail, there it may be prosecuted by attorney, for which there must be a special warrant of attorney filed: And if the plaintiff appear by attorney, when he ought not, &c. this is a discontinuance.

Bail in appeal of murder.

It was also moved that the appellee might be bailed.

And the Court held he must be committed to the marshal, upon the appeal, and the bail must be *corpus pro corpore*: And that the recognizance may be either to the king or to the party, as it was in *Primrose's* case; yet it was held the better course to take it to the king; and so it was done in this case.

At last, upon the appellee's prayer, he was allowed to stand upon the old recognizance till another day, that he might have time to find bail, and to plead, and every thing to be entered as of this day.

At the day appointed the appellee pleaded the indictment and conviction of manslaughter at the sessions of gaol-delivery, which was removed in *R. R.* and that no judgment was thereupon given; and that at the time of the conviction he was and yet is a clerk, and then prayed his clergy, and offered to read as a clerk, if the Court would have admitted him thereunto; and that afterwards, *sc. die Lune prox. post crastinum Pur. Beate Marie Virg.* last, being demanded by this Court, Why judgment should not be given against him? he prayed the benefit of clergy; which being allowed, he read as a clerk, and was burnt in the hand, *prout per record*, &c. with the usual averments; and as to the felony and murder he pleaded not guilty. The plaintiff replied, that he demanded the appellee to plead at the sessions of gaol-delivery, and that he refused. To which the appellee demurred.

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The replication being naught and merely impertinent, the question was upon the bar, *viz.* Whether a conviction of manslaughter, on an indictment of murder, and clergy allowed thereon, could be a bar to an appeal precedent or concurrent

concurrent with the indictment? For both being returned of one sessions, which is but one day in law, the appeal was concurrent at least with the indictment, and precedent to the conviction thereon; so that this was insisted on by the counsel for the appellee to be a case at common law, and not within the 3 *H. 7. c. 1.* which extends not to an appeal antecedent, but subsequent to the indictment. *Sed per Cur.*

Yelv. 204.

At common law, *auter foits convict or acquit* was a good bar to an appeal, for no man's life ought to be twice endangered for the same offence: and so the law would be at this day, had not the 3 *H. 7. c. 1.* altered it; by which acquit or convict on an indictment is made no plea in an appeal, unless clergy be had thereupon. The words of the statute are general, *viz. in an appeal*, without saying, *brought or to be brought*; and therefore extend to all appeals, whether subsequent, or antecedent, or concurrent. And as for the having of clergy, it has been adjudged, that praying of clergy is having of clergy, within the statute; for by praying, the prisoner has done all that he could; and the default or delay of the Court in not granting when they should have granted it, ought not to turn to his prejudice. Here was indeed no regular prayer made to have clergy at the gaol-delivery, because the defendant was never called to judgment by the Court: And if the Court will not proceed to judgment, and ask the party what he can say why judgment should not be against him, whereby he has no opportunity to pray his clergy, it is the default of the Court, and not of the party, and therefore shall not prejudice him: And the plea in this case was held a good bar to the appeal (a). But the appellee was not discharged till *Michaelmas* term following.

Conviction of manslaughter with clergy had, is a good bar to an appeal, antecedent, concurrent, or subsequent: And so it is if clergy were not had by the default of the Court. *Stamf. 98. Hal. Pl. Coron. 190. 4 Co. 40. a. Kelyn. Rep. 94. 107. 2 Leon. 111. Carth. 169. 17, 18.*

(a) *R. acc. 5 Bur. 2798.*

4. *Wilmot versus Tiler.*

[*Pacth. 13 Will. 3. B. R. 1 Ld. Raym. 671. S. C. Com. 109. S. C.*]

APPEAL of murder by writ, and there was but eleven days between the *teste* and return of the writ; defendant pleaded a conviction of manslaughter, and clergy allowed. *Et per Cur.* The fault of the return is cured by the defendant's appearing and pleading in chief; for the reason of fifteen days between the *teste* and return of originals, is to the end the defendant may have time enough to come hither, computing twenty miles to a day's journey; according to which allowance, if the defendants be

In writ of appeal, want of fifteen days between *teste* and return, cured by pleading in chief. *Sid. 406. 2 Keb. 461. Cases B. R. 416. S. C. 443.*

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in *England*, they have time enough to come hither. *Vide* 2 *Inft.* 267. *Brañ. lib.* 3. 135. *lib.* 4. 238. If the defendant would take advantage of this defect, he must plead specially, as in an affize, *nient attach. per 15 jours.* *Vide* 12 *E.* 4. 11. 9 *E.* 4. 18. 1 *Ventr.* 7. And final judgment was given. He pleaded the same plea as in *Armstrong* and *Lisle*, only that clergy was regularly allowed.

5. Loder's Case.

[Pasch. 4 Ann. B. R.]

Ante 62. Plaintiff in appeal must count in person, and not by attorney. If the plaintiff be not present he may be demanded and nonsuited, but such nonsuit is not peremptory, because before appearance. Cro. El. 605. Co. Lit. 139. a. 4 Mod. 99. S. C.

IN an appeal of murder, *Girdler* offered a warrant of attorney for the plaintiff, but that was disallowed, because the plaintiff must count in person. Then he arraigned the appeal in *French*, and delivered in the roll in *Latin*; upon reading whereof, the Court observed the plaintiff counted *per attorn. suum*. And the Court held, 1st, That this had been a discontinuance, if the plaintiff himself had not been present in court at the same time: but if he had been absent, the plaintiff might have been demanded and nonsuited; yet such nonsuit had not been peremptory, for it is but a nonsuit before appearance. 2dly, The Court allowed the words *per attorn. suum* to be struck out, because it made the count agreeable to the truth; and the parchment was not a record in court till filed.

Appearance.

Anonymous.

[Mich. 1 Ann. B. R.]

Process was anciently entered upon the roll. 1 Danv. 463.

HERETOFORE, when a writ issued out of *B. R.* it was entered upon a roll, so that though the officer did not return the writ at the day, yet the defendant might appear at the day, and should be received so to do; either to save a penalty, or his inheritance; and so they did

did in the Common Pleas; they entered the writ upon a roll, by way of recital, viz. *Dominus Rex misit breve suum clausum in hac verba, &c.* Per Holt Chief Justice.

Apportionment and Division.

[65]

1. Countess of Plymouth *versus* Throgmorton. *In Error.*

Vide Record,
post. 778.
Comb. 67.

[Hill. 3 Jac. 2. B. R.]

IN *debt*; the plaintiff declared upon a writing, whereby the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100 *l.* *per annum* for his service, and shews that the defendant's testator died three quarters of a year after, during which time he served him; and demands 75 *l.* for the three quarters; judgment for the plaintiff in *C. B.* by *nil dic.* and now upon error brought, Serjeant Holt argued, that without a full year's service nothing could be due, and that it is in nature of a condition precedent. If I lease lands for years, reserving 20 *l.* rent yearly, and at the end of three quarters be evicted, lessor shall have no rent, for rent shall never be apportioned in respect of time; so it is of wages, annuity and debt. *Annua nec debitum judex non separat.* This being one consideration and one debt, cannot be divided. Judgment reversed (a).

Entire contract
cannot be divid-
ed. 3 Mod.
153. S. C.

Hedl. 53. Lit.
Rep. 61. Co.
Lit. 150. a.
3 Co. 52. b.

(a) Vide 2 Bl. Rep. 1221. H. Bl. 249. 3 Vin. Ab. 8.

2. Hawkins *versus* Cardee.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 360. S. C.]

A. Having a bill of exchange upon B. indorses part of it to J. S. who brings an action for his part, and the defendant demurs, because the contract cannot be divided. And Northey argued this was founded on the custom of merchants, and there may be such a custom in

Carth. 466. S. C.
12 Mod. 213.
Indorsee of part
of the sum in a
bill of exchange,
cannot bring
action without

trade.

showing the other part to be satisfied. Where H. by his contract subjects himself to one action only, it cannot be divided, so as to subject him to two.
 1 Inst. 385. a.
 2 Will. 262.

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trade. *Sed per Holt* Chief Justice, Where a man's contract has subjected him only to one action, it cannot be divided so as to subject him to two. If the grantee of a rent-charge levy a fine of part, he cannot compel the tenant to attorn; yet if he devise part, the devisee shall distrain. If a feoffment be made to a man and his heirs with warranty, and he makes a feoffment to two, the warranty is gone. If two take lands jointly with warranty, and one makes a feoffment over of his part, the warranty is gone as to him, but remains to the other so as he may vouch for his moiety. But by common law, if they had made partition, their warranty was lost. In the principal case, the plaintiff should have acknowledged satisfaction for the rest.

Apprentice. *Vide* Title Orders of Justices. Post.

1. The King *versus* Peck.

[Mich. 10 Will. 3. B. R.]

Show. 405. Order of justices, that executor shall keep testator's apprentice, quashed. 6 Mod. 163, 164.
 1 Show. 76.
 3 Mod. 270.
 2 Salk. 491.
 Raym. 65, 67.
 1 Lev. 84.
 2 Stran. 1266.
 Cro. Eliz. 553.

By custom of London, executor shall place testator's appren-

H. Took an apprentice in husbandry, according to the 5 Eliz. and died before the time of apprenticeship expired, leaving him impotent and a cripple. The justices of the peace at sessions ordered the executor to keep the apprentice; but this was quashed in B. R. because of the great inconvenience that might follow; for it may be the executor has not assets, and lives in another county. And Eyre J. said, That an apprenticeship was a personal trust between the master and servant, and determined by the death of either of them. And by the death of either of them, the end and design of the apprenticeship cannot be obtained; and it may be the executor is of another trade. He admitted covenant would lie against the executor; but in that there is no inconvenience, because the executor may make his defence by pleading no assets, or debts of a higher nature. *Holt* Chief Justice said, That by the custom of London in these cases, the executor shall put the apprentice to another master of the same trade. And that in

In other places it would be very hard to construe the death of the master to be a discharge of the covenants; he said, it had been held that the covenant for instruction failed, but that he still continues an apprentice with the executor, *quoad* maintenance. *Adjournatur. Vid. 1 Lev. 177. 1 Sid. 215.* The executor is liable in covenant, if he does not instruct him, or find him another master.

die to another master of the same trade.

2. The King *versus* Fox.

[67]

[Paf. 11 Will. 3. B. R.]

INDICTMENT for using the trade of a tailor, not having served an apprenticeship seven years, was quashed, because only said, Not having served as an apprentice *infra regnum Anglie aut Walliam*; for it may be he did so beyond sea; and if it were any where, it suffices.

Service of apprenticeship beyond sea, sufficient to enable H. to use the trade in England. Post. pl. 5. Mod. Cases 128. Cases B. R. 251. S. C.

3. Dillan's *Case*.

[Hill. 11 Will. 3. B. R.]

THE Court held, 1st, That justices may discharge an apprentice, and may also order a restitution of the money within the equity of the statute (a). 2dly, That if the master, being bound to answer at sessions, does not appear, it is a forfeiture of his recognizance; but yet at the same time the justices may proceed to make an order against him.

Jurisdiction of justices over the master. Post. 68, 490, 491. 1 Saund. 213. Cases B. R. 498. S. C. Holt 68. Rep. B. R. temp. Hard. 191.

(a) 5 Eliz. c. 4. Vide St. 20 G. 2. c. 19.

4. Anonymous.

[Hill. 11 Will. 3. B. R.]

THE justices may force a master to take an apprentice, for by the statute the justices are to put them out, and therefore must be construed to have consequentially a power to compel the master to receive him: And if the master turn him away, they can make him refund. 1 Lev. 191. Upon an order made at the sessions to discharge the apprentice, it did not appear that he applied himself first to a justice of peace; and Holt C. J. was of opinion, the justice has power to make an order; and if obeyed by the master, then the sessions can have no power; if disobeyed,

Justices may force a master to take an apprentice. Per Holt C. J. that the sessions have not originally jurisdiction to discharge apprentices. Show. 76. 3 Mod. 269. 1 Sid. 99. 8 & 9 W. 3. chap. 30.

Contra: Vent. 325. 1 Sid. 99. Cart. 116. Post. 68, contra. 1 Mod. 2, 287. 1 Lev. 84. 2 Salk. 491. 1 Saund. 314. 16 Mod. Cases 164. Carth. 94. Skin. 114.

obeyed, then the justice, upon complaint, may bind the master to the sessions; and that the sessions have no power otherwise. *Turton and Gould, cont.* That he could not bind over. *Adjournatur.*

5. Froth's Case.

[10 Will. 3. at Surry Affizes. 1 Ld. Raym. 738. S. C.]

Service beyond sea excuses from 5 Eliz. Ante, pl. 2. Holt 675. S. C.

H Served seven years as an apprentice beyond sea, but was not bound. This is sufficient to excuse him from the penalties of 5 Eliz. per Holt C. J. at Surry Affizes.

[68]

6. The King *versus* Johnson.

[Trin. 13 Will. 3. B. R.]

Ante 67. Sessions may discharge apprentice by original order, and order money to be returned. 1 Mod. 2, 287. 1 Saund. 314. Contra pl. 4. Post. 490, 491. Far. 55. 1 Saund. 314. 2 Salk. 470, 490, 491. S. C.

EXCEPTION was taken to an order for discharging an apprentice, 1st, That the complaint was made originally at sessions without any previous application to a single justice out of sessions. And 2dly, That the justices had ordered money to be returned. And now Holt C. J. delivered the resolution of the Court, That the order was good. If it had been a new question, he should have held a prior application to some justice out of sessions necessary; but after so many orders affirmed in this court, which have been otherwise; it is too late to unsettle that now (a). As to the second point, he never doubted that, for it is a power consequential upon their jurisdiction to discharge (b).

(a) R. acc. Str. 143, 704. Ca. Temp. Ld. Har. 101.

(b) R. cont. Str. 69. R. acc. 2 Bac. Ab. Ma. and Ser.

7. Inter Inhabitantes Parochæ Castor & Aicles.

[Mich. 13 W. 3. B. R. 1 Ld. Raym. 683. S. C.]

Apprentice is not assignable. Ante 66. 2 Salk. 491. 1 Lev. 84. Cannot be bound nor discharged without deed.

A Poor child being bound at *Castor*, his master there assigned him over to another master who lived in *Aicles*; and it was held, that the poor child should gain a settlement at *Aicles* where his second master lived; for though the apprentice was not assignable, yet that assignment was not merely void, but amounted to a contract between the two masters, That the child should serve the latter. So that

that this assignment is good by way of covenant, though it be not an assignment to pass an interest (a). *Vide 3 Keb. 304. 21 H. 6. 21, 22.* One cannot be bound an apprentice without deed, nor discharged without a deed (b).

- (a) *R. acc. Bur. S. C. 578. Bl. Re. 365. 1 Sess. C. 315.*
and many other cases cited, 3 *Burn. Jusf.*
(b) *R. cont. 1 T. R. 139.*

8. Barber *versus* Dennis.

[Trin. 2 Ann. B. R.]

A Waterman's widow took an apprentice, who went to sea and earned two tickets, which came to the defendant's hands. The widow brought trover for the tickets, and had judgment: for what the apprentice gains, he gains to his master; and whether legally apprentice or not, is no ways material, for it is enough if he be so *de facto* (a).

6 Mod. Caf. 69.
Whatever apprentice gains belongs to the master, and he may have action for it. *Skin. 579.*

- (a) *R. acc. 1 Vex. 83. Vide Harg. no. to Co. Lit. 117. 2. St. 2 & 3 Ann. c. 6. 31 G. 2. c. 10. 1 Str. 592. 1 Vex. 48.*

Arbitrement.

[69]

1. Freeman *versus* Bernard.

Vide Record, page 785.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 247. S. C.]

ASSUMPSIT for hops; defendant pleads a submission of all demands to the arbitrement of J. S. so as it be made and ready to be delivered by such a day, and that *tel jour* (being before the day in the submission) J. S. made an award, and thereby awarded, That the defendant or his executor should release to the plaintiff, which he always was and is ready to do. *Et per Cur.* It was held,

Carth. 378.
Assumpsit; defendant pleads in bar an award, that the defendant or his executor should release to the plaintiff. *Lut. 524. 3 Mod. 331. Comb. 440. S. C. Holt 79. Cases B. R. 130. 3 Salk. 45.*

1st, That the award being pleaded to be made before the day, it is in consequence ready to be delivered, and its being

being ready to be delivered need not be averred. 1 *Cro.* 54. *Id.* 75.

Where the award creates a new duty, the old is extinguished thereby. *Post.* 76. But where it only ordains a release to discharge the old duty, it is otherwise. 1 *Mod.* 274. 1 *Danv.* 556. 3 *Lev.* 264, 413.

2dly, That an award may be a good plea in bar, though it be not performed, wherever the award does give a new duty in lieu of the former; for a submission implies a promise to perform, so that the party has a remedy for that which is awarded; but where the intent of the award is not to discharge the old duty itself, and give a new one, but barely to cause a discharge of the old duty, not by the award itself, but by a release, as, in the principal case, the award is no plea in bar of the old duty. [*This was the principal point in this case; and quære, if an award unperformed, though it gives a new duty, can be a good plea after the time of performance elapsed? Vide 6 H. 7. 11. Dy. 75. per How of counsel in this case.*] (a)

The law supplies time of performance.

3dly, The Chief Justice seemed to think the award good, though no time was appointed for performance; for the law supplies the time; if there must be a request, the law says, it must be in convenient time after request; if there needs no request, but there must be a tender, that must be likewise in convenient time. *Vide 7 H. 4. 30, 31.*

Award that the party, or his executor, shall release, is good. 3 *Lev.* 27, 23, 24.

4thly, He inclined to think that the disjunctive, *he or his executors*, might be helped, by construing that as to the executors void: Not but that an award may extend to executors and bind them, *vide 1 Ventr. 249. & 3 Cro. 557, 600*; but because the executors, as representatives, would be liable of course,

(a) See observations on this point in Mr. Kyd's *Treatise on Awards*, 241.

No objection can be taken to an award for want of certainty, because it appoints no time or place for the payment of a sum of money, though it be in the power of the arbitrator to appoint a time for payment, or for doing

any collateral act, because the award shall have a reasonable construction; the party shall have a reasonable time to pay the money; a demand within a reasonable time shall be sufficient to entitle the opposite party to recover, and the place is perfectly immaterial. *Kyd, 137.*

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2. Reynolds *versus* Gray.

[Pas. 9 Will. 3. B. R. 1 *Ld. Raym.* 222. S. C.]

Cass B. R. 120. S. C. *Cro. Car.* 263. 2 *Saund.* 133. 1 *Rull.* Abr. 261. pl. 72. Appointment of umpire by arbitrators, before the time for making the

A Motion was made for an attachment for not performing an umpirage of *H.* chosen by arbitrators who were appointed by rule of Court. And it was held by *Holt C. J.*

That if arbitrators choose an umpire before the time allowed for their award be expired, it is *ipso facto* void, though they absolutely resolve to make no award themselves: and that when their time is expired, if the arbitrators

trators choose one, their authority is executed, and they cannot revoke or choose again, though the person elect refuse to accept. * *Aliter*, if they choose their umpire upon condition that he does accept the umpirage, for then he is not umpire unless he accept it. *Rokeby* doubted, whether an express condition would make a difference, because it seemed to be implied (a).

Lutw. 539. 1 *Mod.* 275. 1 *Lev.* 285, 2 *Mod.* 169. *Raym.* 187. 2 *Keb.* 562. 1 *Lev.* 302. 1 *Dan.* 548, pl. 11.

(a) The result of the different cases upon this subject appears to be as follows: When the power of the arbitrators and umpire is limited to the same time, if the arbitrators do in fact make an award within the time, that shall be considered as the real award, and if they make none, then the umpirage shall take place, the umpire having no absolute, but only a conditional concurrence. *Cbaise v. Dare*, Sir T. Jon. 168. *Vide Cowell v. Waller*, 2 *Barnard. K. R.* 154. It is now finally determined, that arbitrators may nominate an umpire before they proceed to consider the subject referred to them; and that this is so far from putting an end to their authority, that it is the fairest way of choosing an um-

pire. 2 *Term Rep.* 645. It is not unusual to insert a condition that the umpire shall be chosen before any other act. The arbitrators may choose an umpire after their own time, provided it be within his; *Bardal v. Harris*, 3 *Keb.* 387. *Freem.* 378. *Adams*, 2 *Mod.* 169. In the case of *Trippet v. Eyre*, 3 *Lev.* 236. 2 *Ventr.* 113, it was ruled, that the arbitrator's power was not expired by nominating an umpire who refused such nomination, being no more than a bare proposal unless accepted; contrary to the opinion of *Polluxen Ch. J.*—and of *Helt* in the case of *Reynolds v. Grey*. It does not appear that there has been any subsequent decision upon the point; *vide Kyd* 46, 58.

3. Bacon *versus* Dubarry.

Vide Record,
page 787.

[*Trin.* 9 *Will.* 3. *B. R.* *Intr. Trin.* 7. 1 *Ld. Raym.* 246. *S. C.*]

DEBT on a bond; defendant prayed *oyer*: Condition was, whereas there was a controversy between the plaintiff and the defendant, as attorney to *De Rutter*, concerning certain accounts between the plaintiff and *De Rutter*; and the plaintiff and defendant had submitted the said controversy to the award of J. S. arbitrator, if *De Rutter* stood to the said award, then the bond to be void, &c. Upon *nul agard* pleaded, the award set forth was, that the defendant should pay the plaintiff 400 *l.* and that the plaintiff and defendant should mutually release to each other. To this it was demurred; and it was held *per Cur.*

1st, That the submission was good, though the defendant submitted for another; for one man may undertake for another, or be bound for another; but such submission is good

2 *Salk.* 787.
Submission by
A. as attorney
for B. concern-
ing accounts be-
tween B. and C.
good to bind A.
but not B.
Comb. 439.
S. C. Skin. 679.
Cases B. R. 129.
Carth. 412.
Holt 78.

3 *Leon.* 62.
1 *Brown.* 91.
2 *Lev.* 6. *Br.*
Arbit. 51.
2 *Saund.* 337.

good only to bind himself, and cannot bind the other; because he is a stranger to the agreement of submission.

Award pleaded as made de & super præmissis, not enough unless it appear to be so in fa. 6 Mod. 232, 244. Cro. El. 861. pl. 37. 3 Lev. 188, 344.

2dly, That the award is not good, because, though the defendant submitted, yet he submitted as attorney, & *ex parte alterius*; and the matter which the defendant submitted was the business and controversy of another, *sc.* his principal. That a release to the attorney is no discharge as to the principal, therefore this release will not discharge such demands as the plaintiff has against *De Rutter*; so if *De Rutter* is to pay the 400 *l.* he is to have nothing for his money: It makes the award of one side only, and not mutual (a). *Aliter*, had the release been awarded to the defendant for the use of *De Rutter* or de & *super præmissis*. And the award being not so, the pleading it to be made de & *super præmissis* cannot mend or extend it. And as to *Nichol's* case, *Holt* Chief Justice said, It only proved, that money paid and accepted in pursuance of a void award might be pleaded or taken as an accord, with satisfaction. Judgment *pro* defendant. 1 Ro. 253, 254. Sty. 44. Hob. 49. 8 Co. 97. 2 Cro. 354 (b).

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Money paid on a void award may be pleaded as accord and satisfaction.

(a) *Vide Kyd* 147 to 154. The principal requisite to form the mutuality of an award, is nothing more than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favour the award is made against the other for the cause submitted. It is sufficient to award a sum of money *in consideration of a debt long due*, 8 Co. 98. That all suits or controversies shall cease, and one party shall pay the other a given sum, *Strangford v. Green*, 2 Mod. 228. *Cole's* case, Rol. Ab. K. 10. *Harris v. Kuipe*, 1 Lev. 58. or the payment of a sum, and that the parties shall continue in friendship, Rol. Arb. K. 10. to pay for a trespass, *Ormlade v. Cooke*, Cro. Jac. 354. Hob. 49. *Freem.* 205, 266 to recite that there had been dealings between the parties, and that 40 *l.* was due to the plaintiff, and to award payment of that sum. *Elliott v. Chevall*, Lutw. 541. to award that the defendant should pay the plaintiffs 10 *l.* for costs in a suit commenced against them by the defendant without cause, and that all suits and differences should cease. *Walmough v.*

Holgate, 2 Ventr. 221. Comb. 212. to recite several grievances by the defendant to the plaintiff, and award the payment of money, without expressing it to be in satisfaction, for that must necessarily be intended, *Burbridge v. Raymond*, Rol. Abr. K. 17. It may now be safely laid down, that it is not necessary that the award itself should express that a sum awarded to be paid, or an act to be done in favour of one of the parties, shall be in satisfaction, or that it should contain any equivalent terms, a discharge to the other must necessarily be presumed, *Kyd* 153. An award to pay 7 *l.* and the costs in a suit to the plaintiff, without directing releases, or using words of satisfaction, held a good bar to an action of trespass, *Tomlinson v. Ariskin*, Com. 328. An award for the defendant to pay a sum of money, and take his mare, &c. from the plaintiff's within a week, good, *Cowp. v. Kust*, Lutw. 539. — *Quere*. Whether, in the case of *Bacon v. Dubarry*, the release awarded would not now be construed, *secundum subjectam materiam*, to mean a release for the benefit of the party interested.

(b) *Vide 1 Will.* 28, 58. *Comyns* 183.

4. Anonymous.

[Pas. 10 Will. 3. B. R.]

WHERE an award is made by rule of Court, it shall not be set aside, unless there was practice with the arbitrators, or some irregularity; as want of notice of the meeting. Also you shall not take exceptions to the formality of it, but shall perform it. *Per Holt* Chief Justice (a). What shall be good cause to set aside an award made by rule of Court, and what not. Vide post 73, 83. Far. 8. Jon. 179. Str. 301. & Sid. 54.

(a) *Vid Kyd, c. 7. p. 226.* In the case of *Lucas ex dem. Markham v. Wilfon*, 2 *Bur.* 701. it was ruled, that submissions to arbitration, where a cause is depending, remain as at common law; and the stat. 9 & 10 *W.* was made to put submissions, where there was no cause depending, upon the same footing. Lord *Mansfield* said, The Court will not at all enter into the merits of the matter referred to arbitration, but on y take into consideration such legal objections as appear upon the face of the award, and such objections as go to the behaviour of the arbitrators. The same was likewise ruled in *Waller v. King*, 2 *pt. Ca. Law & Eq.* 63. *Greenbill v. Church*, 3 *Cb. Rep.* 49. *Brown v. Brown*, *Ca. Cb.* 140. 1 *Vern.* 157. Where a submission is by bond, &c. and not by rule of Court, the only remedy against an improper award is by bill in equity; and it seems the grounds for relief are the same as on submissions by rule in courts of common law.

If, on cross applications to set aside the award and for an attachment, the court of common law is equally divided, equity will interpose; *Ward's case* cited, 2 *Atk.* 155, 396. 2 *Ven.* 316. An award will be set aside if the reference is to three or any two of them, and two improperly exclude the third; or if the arbitrators have private meetings with one of the parties, concealing them from the other; *Barton v. Knight*, 2 *Vern.* 514. or if the arbitrators toss up for choice of an umpire, the umpirage will be set aside; 2 *Vern.* 485. So, if the arbitrators differ between the sums of 35 *l.* and 95 *l.* and

the umpire awards 150 *l.* his servant having previously given out that his master would award that sum; 2 *Vern.* 101. *pl.* 95. *Anon.* So, if the arbitrators promise to hear witnesses, or wait till one of the parties is well, and do not; *id. ibid.* So, if an arbitrator refuses to attend to stated accounts, and to defer making his award until the party can talk with him respecting them; *Spettigue v. Carpenter*, 3 *P. W.* 362. or uses improper warmth, as to say, "I will make you pay costs;" *Ward's case ante*; or when one arbitrator said, "he should consider and judge on plain facts;" and the other replied, "he should not mind facts; but being convinced that *A.* had used *B.* ill, he would mulct his representatives;" *Chicot v. Lequeime*, 216. (In the three preceding cases the arbitrator was made to pay costs.) So, where the arbitrators will not proceed without a sum of money to be paid by the parties; and one party refusing, the other pays the whole; 2 *Barnard.* 463. So, where the arbitrators appear to have an interest in the subject of reference; *Earle v. Stocker*, 2 *Vern.* 229. An award will also be set aside if material circumstances are suppressed or concealed from the arbitrators; 1 *Atk.* 77. (64). *S. S. Comp. v. Bamstead*, 3 *Vin. Ab.* 139. Where the submission is by rule of Court, the Court will listen to an application to have the award sent back for reconsideration, on the suggestion that the arbitrator had not sufficient materials, perhaps to rectify a trifling or apparent mistake; *Vide Champion v. Wenham*, *Ambl.* 245. In *Montefuri v. Montefuri*,

furi, 1 *Bl. Rep.* 363. an award that a him as a man of fortune, should be denote, which one of the parties had delivered up, was set aside, the arbiters to the other to assist him in his law. designa of marriage by representing

5. Glover *versus* Barrie.

[*Trin.* 10 *Will.* 3. *C. B.*]

Award that *A.* should beg *B.*'s pardon in such manner and place as *B.* shall appoint, is void *quod hoc.*
2 *Lutw.* 1597.
S. C. N. L.
522.

DEBT upon a bond conditioned that *A.* and *B.* should perform an award; defendant pleaded no award made; plaintiff replied an award, which was that *A.* should pay *B.* 50 *l.* and that *A.* should beg *B.*'s pardon in such manner and in such place as *B.* should appoint; and that then each party should seal mutual releases. The Court held this naught; for the arbitrator was to determine, and not to make *B.* his own judge in his own cause; and though the time and place be but circumstances, yet in this sort of satisfaction they make the most considerable part. *Ergo* the award was held void as to this part.

6. Anonymous.

[*Mich.* 12 *Will.* 3. *B. R.*]

Award made under a rule of Court, is quasi part of the rule.
1 *Lill.* 121.

WHERE a matter was referred by rule of Court to the determination of the judges of assize, it was moved that the judges determination might be made a rule of Court. *Et per Holt* Chief Justice: Where a matter is referred to arbitrators by rule of Court, and they make their award, we will compel a performance of it as much as if the award were part of the rule; so a new rule is needless.

7. Mitchell *versus* Harris.

[*Paf.* 13 *Will.* 3. *B. R.* 1 *Ld. Raym.* 671. *S. C.*]

2 *Lev.* 285.
2 *Saund.* 129,
233. *Nelson's*
Lutw. 167. *Sty.*
133, 136. *Cro.*
Car. 263. *Cases*
B. R. 512. *S. C.*
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Where umpirage may be made before the time at

A Submission to two, so as they made their award on or before the 29th of *June*; and if they made no award, choose an umpire: They chose an umpire on the 29th; and exception was taken that they had the whole twentieth to make their award. *Et per Holt* Chief Justice, If there be a submission to two, so as they make their award before *Midsummer*, and if they cannot agree, then to such umpire as they choose, so as he make his umpirage before *Midsummer*, and an umpire is chose accordingly; this is good.

good, and so will his umpirage be, if made; because the arbitrators had determined their power before, by choosing an umpire. And so it was resolved in the case of *Tewleston* and *Traverse*: But if the umpire be named in the submission, he cannot make his umpirage before the time given to the arbitrators to make their award in be expired. Judgment *pro quer. nisi*.

lowed to the arbitrators is expired, and where not. 1 Lev. 174, 235, 302. Ante 70. 1 Mod. 15, 274. 2 Saund. 129, 132. 2 Keb. 562. 2 T.R. 644.

8. Baily *versus* Cheeseley.

[Pas. 13 Will. 3. B. R. Comyns 114. S. C. 1 Ld. Raym. 674. S. C.]

A Submission was to an award by bond, and in the end of the condition of the bond was this clause: *And if the obligor shall consent that this submission shall be made a rule of Court; that then, &c.* Upon motion to make this submission a rule of Court according to the new act of parliament, it was opposed, because these words do not imply his consent; but if he would forfeit his bond, he need not let it be made a rule of Court; yet because this clause could be inserted for no other purpose, the Court took these conditional words to be a sufficient indication of consent, and made the award a rule of Court (a).

Submission to award, made a rule of court, though the consent was only conditional.

(a) *Vide* 2 Str. 1178.

9. Foreland *versus* Marygold.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 715. S. C. by the name Foreland *versus* Hornigold.]

DEBT upon a bond to perform an award: Defendant pleads no award made; the plaintiff replies and sets forth an award with a *profert in Cur.* and there were material omissions. The defendant craved *oyer*, and demurred for the variance between the award set forth in the replication and the *oyer*; and in the argument it was insisted for the plaintiff, That in debt on an award the plaintiff need not set forth more of the award than makes for him. 1 Sid. 161. 1 Lev. 162. To which it was answered, That true it is, in debt upon an award the plaintiff need not set forth more than makes for him; but it is otherwise in debt upon a bond, for there the plaintiff must reply the whole award. Holt C. J. In debt upon a bond (a) to perform an award if

In debt upon bond to perform an award, omission in the replication of a void part of the award is no variance; otherwise if not void. 1 Lev. 132. 1 Keb. 738. 1 Sid. 161. 3 Lev. 24. Post. 497. Holt 80. S. C. 12 Mod. 533. S. C.

(a) *Vide* 1 Bur. 278. It was there need to state in his declaration any said *per Curiam*, that in an action of more of the award than supports his debt upon an AWARD, a man has no case; and ruled *acc.*

nul

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nul agard fait be pleaded, and the plaintiff replies an award, &c. and issue is thereupon; in such case, if there is material variance between the award given in evidence, and the award set forth in the replication, it is against the plaintiff; but if the variance be only by omission of that which is void, that is not a material variance, being no material part of the award. Here the variances are by omissions that are material; therefore judgment must be for the defendant. Note also, if the plaintiff had not made a *profert*, the defendant's way had been to have pleaded *nul tiel agard*.

10. Davila *versus* Almanza.

[Pas. 1 Ann. B. R.]

Breach of a rule of reference made at nisi prius. S. C. Far. 8. by name of Davila *versus* Dalmanster. Cases B. R. 408.

A Matter was referred by consent at *nisi prius* to the three foremen of the jury; and before the award was made, one of the parties served the arbitrators with a *subpoena* out of Chancery, which hindered the proceeding to make the award. And the Court held this a breach of the rule, and granted an attachment, *nisi causa* (a).

(a) In the case of *Rex v. Wheeler*, 3 Burr. 1256. an attachment was awarded against the defendant, who, after moving unsuccessfully to set the award aside, paid the money awarded, and filed a bill in equity against the other party and the arbitrator; he was re-

ported in contempt: but, upon his paying all costs, the Court waived giving judgment, and said, the attorney and counsel were equally guilty of the contempt, and more criminal; and, if it ever happened again, they would proceed against them.

11. Morris *versus* Reynolds.

[Pas. 2 Ann. B. R. 2 Ld. Raym. 857. S. C. *quod vide*, as it seems the other Judges differed from Holt.]

Reference to the three foremen of the jury. Regularity of their proceedings examined into. While award is under the consideration of the Court, non-performance is no contempt. 3 Keb. 446. Holt 81. S. C.

UPON a submission to the award of the three foremen of the jury who made their award, the defendant moved to set it aside, because they went on without giving him time to be heard or produce a witness; and Holt Chief Justice denied the diversity, *Pla.* 4. He said, the arbitrators being judges of the parties own choosing, the party shall not come and say they have not done him justice, and put the Court to examine it. *Aliter*, Where they exceed their authority; however the award was examined and confirmed: and the plaintiff moved for an attachment for not performing it; and the Court held, that the non-performance, while the matter was *sub judice*, was no contempt. Then the plaintiff moved for his costs, and that was

was denied. Upon which *Powell* Justice said, that seeing they could not give the party any costs, he should never be for examining into awards again (a).

(a) See 2 *Ves.* 216. *Str.* 301. 3 *Atk.* 644. 3 *P. Wms.* 361.

12. Anonymous.

[*Pal.* 2 Ann. B. R.]

H. Bound himself in a bond to stand to the award of *J. S.* which submission was made a rule of Court, according to the new act of parliament. The party, for whose benefit the award was made, moved the Court for an attachment for non-performance; which was granted: Pending that he brought an action of debt upon the bond; and now Serjeant *Darnell* moved that he might not proceed both ways; and likened it to the cases, where the Court stays actions on attorneys bills, while the matter is under reference before the Master. *Sed per Cur.* The motion was denied, and this diversity taken; where the Court relieve the party by way of amends in a summary way, as in the case cited, there it is reasonable; otherwise here where the plaintiff has no satisfaction upon the attachment. And the defendant was put to answer interrogatories. But, see *Andr.* 299. *contra.* and *Cases Temp. Ld. Hardwicke* 106 (b).

Upon award made a rule of court, the party may proceed both by action and attachment at the same time.
1 *Keb.* 130.
138. 2 *Keb.* 22, 575, 585.
Raym. 35.
Post. 84.

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(b) *Vide Kyd.* 217. The Court will not stay proceedings in the action, though the defendant is in custody on the attachment; *Webster v. Bishop*, *Proc. Ch.* 223. 2 *Vern.* 444. but if the defendant be taken in execution on the judgment, the attachment will be discharged; *Richardson v. Chancery*, 1 *Barnard.* 386; and the Court will not grant an attachment after an action brought, without some very particular reason; *Stock & Huggins v. De Smith*, *Rep. B. R. Temp. Hard.* 106. It is discretionary in the Court to grant an attachment; and, where there was a contrariety of evidence, the party was left to his action; *Hales v. Taylor*, *Str.* 695.

13. Bird *versus* Bird.

[*Trin.* 2 Ann. B. R.]

D.EBT upon a bond. The defendant prayed *oyer* of the condition, which was for performing the award of *J. S.* and pleaded *nul agard fait*. The plaintiff replied, and set forth an award; which was, that the plaintiff and defendant should pay such a certain sum yearly to *A.* for the use of Mrs. *Bird* their mother. Mr. *Broderick* took an exception to the award, that this was to award a thing to be done to a third person, who is a stranger to the submission,

Quere, If an award of money to be paid to a third person be good, unless it appear to be for the benefit of one of the parties?
2 *Lev.* 6, 235.
3 *Lev.* 153.
2 *Saund.* 337.
2 *Keb.* 767.

mission, and consequently of a matter out of the power of the arbitrators. *Holt* Chief Justice was of opinion that a general award of money to a stranger was good; for it shall be intended the submittants were bound as trustees, or were liable to pay the same; and the payment shall be intended for their benefit, unless the contrary appear. *Powell* Justice *contra*. It must appear to be for their benefit, and it shall not be so intended, unless it does appear; but in the principal case he held, that it should be intended to be for their benefit, or rather that it appeared to be so, because the payment was to be for the use of the mother. *Vide 5 Co. Salmon's case. 3 Crs. 4, 758. 1 Ro. 247, 259. 2 Lev. 235.* Afterwards the matter was referred to the counsel on both sides; so no judgment was given.

5 Co. 78. a.

14. Simon *versus* Gavil.

[*Trim. 2 Ann. B. R. 2 Ld. Raym. 961. S. C. called Squire versus Grevett.*]

Award that all suits shall cease is final. *S. C. 6 Mod. 33. called Squire vers. Gravel. All. 86. Moor 642. 2 Vent. 222. 2 Mod. 228. Hill. 8 W. 3. B. R. Hopper and Pearse held so. Barnes 36. 2 Str. 1024. Kyd 142.*

Award to make general release of all demands to the time of the award, is good for so much as goes to the time of the submission, and void for the residue. *1 Lev. 133. 2 Samd. 292. 1 Roll. Abr. 263, 264. 6 Mod. 232. Holt 81.*

* [75]

A Submission was of all controversies pending; the arbitrator awarded that all suits now pending between the parties should cease, and that the defendant should pay 10 *l.* in full of all demands, and release all demands till the time of the award; and upon the payment of the ten pounds the plaintiff should release to him, &c. Upon a writ of error of the judgment given in *C. B.* the Court held, 1st, That an award that all suits pending should cease, is final: For the meaning is not that the party shall be nonsuit, or should give over, and begin again; but that the suit should cease absolutely for ever; so that the right itself is gone, because the remedy is quite taken away; for if his suit fails, he has no remedy to come at his right. *Vide 1 Ro. Ab. 51. 1 Lev. 58.* 2dly, An award of a general release of all demands till the time of the award, is good; for nothing new shall be intended to arise in the mean time; and if any new controversy or demand did happen in the mean time, the award as to that new demand or controversy is void; for that was not within the submission, and therefore it is a good performance of it to tender a release of all matters in controversy to the time of the submission, which is all he is bound to release. Also if a new controversy has happened, which is not to be intended, he that pretends to excuse the non-performance, ought by his pleading to set it forth, and shew it (a). *Vide 3 Lev. 180. contra.* 3dly, If the plaintiff

(a) *Vide Bumb. 250. Doug. 259, 659. 1 T. R. 638. 1 Bur. 278. 2 Bl. Rep. 1117.*

would not receive the ten pounds because he would not be obliged to release, when the defendant tendered, and he refused, he was as much obliged to release upon the tender and refusal, as if he had actually received the money. *Sir Thomas Parker pro quer.*

Show. 272.
1 Sid. 365.
3 Lev. 344.
Winch. 1.

15. Oates *versus* Bromil.

[Trin. 3 Ann. B. R.]

DEBT on a bond conditioned to perform an award, *ita quod* it be made and ready to be delivered by such a day; defendant pleaded no award; plaintiff replied a parol award, and avers it was made and ready to be delivered by such a day. Defendant demurred: *Salkeld* for the plaintiff insisted a parol award was deliverable; for a man is said to deliver a message as well as a letter, and that there is an oral as well as a manual tradition; and as a parol award is capable of delivery, so it is ready to be delivered from the time it is agreed upon. *Dyer* 218. 3 *Bullst.* 34. *Co. Ent.* 128. And notwithstanding Sergeant *Broderick* on the other side urged importunately, and cited a late case in *C. B.* as he said, in point, the Court on consideration gave judgment *pro quer.*

6 Mod. 82, 160
176. Parol award may be pleaded ready to be delivered, &c.
1 Lev. 113.
1 Sid. 160.
1 Dan. 27. 3.
2 Vent. 242.
1 Lev. 68.
3 Keb. 89, 125.
2 Salk. 676.
Holt 82. Ante 69.

16. Winter *versus* Garlick.

[Trin. 3 Ann. B. R.]

AWARD that the one party shall pay the other ten pounds and the costs of a suit now depending in an inferior court, and then to give mutual releases. *Per Cur.* To pay such costs as the Master shall tax is good; for *id certum est, quod certum reddi potest*: But this is uncertain, and carries it farther than has hitherto been allowed. *Adjournatur.* 1 *Cro.* 383. 2 *Vent.* 242, 243 (a).

Vide Record, page 790.

6 Mod. 195.
S. C. Award to pay the costs of such a suit is uncertain. 3 Lev. 18, 188. 1 Lev. 58, 133.

(a) Replication of an award to pay 4*l.* costs in an inferior court, and to give releases, and breach for non-payment of the 4*l.* good, the award being valid as to that, though void as to the costs. *Addison v. Gray*, 2 *Wils.* 293.

If a suit is in a superior court, and it is awarded that a party shall pay costs

of the suit to be TAXED, it shall be understood to be taxed by the proper officer of the court. *Barnes* 56. So in case of an award to pay costs generally. *Dudley v. Nettleford, Str.* 737. *Tbomlinson v. Ariskin, Com.* 330. *Vide Kyd* 88. *Rep. B. R. temp. Hard.* 181.

Mod. Cases 231.
232. Award
that a suit in
Chancery shall
be dismissed is
good. Cro. Eliz.
7. 1 Lev. 58,
133. 2 Saund.
292. 1 Roll.
Abr. 263. 4.
Ante 74.

17. Knight *versus* Burton.

[Mich. 3 Ann. B. R.]

AWARD that a suit in Chancery should be dismissed: Objected; he may dismiss and begin again; that it is like an award to be nonsuit. *Curia*: An award to be nonsuit is not good, for it is not final in the nature of the thing; but we will intend this to be meant of a substantial dismissal and perpetual cesser in this case. If a man be to deliver up a bond to be cancelled by such a day, and he sues and gets judgment in the interim, and then delivers up the bond, this is a performance in the letter, but not in the intent; so will such a dismissal, in case a new bill be brought afterwards.

[76]

18. Armit *versus* Breame.

[Mich. 3 Ann. Intr. B. R. Hill. 2 Ann. 2 Ld. Raym. 1076. S. C.]

An award which directs the performance of an act within a limited time *a datu arbitrii* is good, though it is *not dated*. S. C. Arnot *versus* Brown. 1 Lutw. 382, 386. 6 Mod. 233, 244. S. C. 312. called Arnote *ver. Breame*. 2 Salk. 498. Far 38. S. C. Post 498, 425. Holt 212.

DEBT upon a bond, with condition to perform the award of *J. O. &c.* of all differences between the plaintiff and defendant, concerning a piece of ground used as a wharf, and several erections thereupon, which were nuisances to the plaintiff's house. The defendant pleaded that the arbitrators made no award. The plaintiff replied and set forth an award, whereby it was awarded that the defendant should enjoy the wharf, and the erections should be pulled down within the space of fifty-eight days from the date of the award. The defendant demurred; and it was objected, That the award was pleaded without any date; and that it did not appoint who should take down the erections, and therefore it was uncertain. *Et per Cur.* The day of the delivery of a deed is the day of the date, though there is no date set forth: If a deed bear date one day, and be delivered at another; it was really dated when delivered, though the clause of *geren. dat.* be otherwise: So it is in the case for this award, the making is the date. And in this case, *Powell, Powys*, and *Gould* held, That though it was not said who should remove the erections, yet that was supplied by the law; they shall be removed by him on whose ground they stand, which in this case appears to be the defendant's. *Vide Style* 365. 1 Roll. 364. 5 Co. 78. Cro. El. 472. Ma. 39. Holt C. J. *semble contra*, as to this point. And judgment was given for the plaintiff by three Judges against Holt C. J.

19. *Parfloe versus Baily.*

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1039. S. C.]

IN trespass, it was held heretofore, that an award of a collateral thing in satisfaction was no good plea, unless the defendant shewed a performance; for they likened this to an accord and satisfaction, which is no plea unless it be executed (a); yet they held that where the award was not of a collateral thing, but of a sum of money, that such an award was a good plea; and the reason of the difference which they went upon was, that there was a remedy to be had upon the arbitrement in the latter case, not in the former: But now the law is held otherwise, and an arbitrement is a good plea, whether it be of money or a collateral thing, as a hat or a horse; and the reason is, because the submission is a mutual promise, upon which an action lies, and performance need not be averred in either case, for the remedy is alike, *per Holt C. J.* But *Perrell Justice contra.* It must be averred where the award is of a collateral thing (b).

An award of a collateral thing in satisfaction is a good plea without shewing a performance. Ante 69. S. C. 6 Mod. 221. by name of Boilsloe *vers.* Baily. 9 E. 4. 44.

(a) So ruled, 5 *Term Rep.* 141.

(b) *Hawkins v. Colclough*, 1 *Bar.* 274. Lord Mansfield—Awards are now considered with greater latitude and less strictness than they were formerly; and it is right that they should be liberally construed, because they are made by judges of the parties own choosing. Indeed they must have these

two properties to be certain and final; but the certainty may be judged of according to a common intent, and consistent with fair and probable presumption. He declared against critical niceties in scanning awards. *Dennisen J.*—Awards ought to be construed liberally and favourably.

Arrest of Judgment.

[77]

1. *Peachy versus Harrison.*

[Trin. 9 Will. 3. C. B.]

IT is not a good exception in arrest of judgment, that there is no warrant of attorney filed, though that be matter of record, and may be assigned for error. The reason is, because, though it be a matter of record, yet it is not of that record before the Court, but of another.

What matter of record may be taken advantage of in arrest of judgment, and what not. Cowp. 455.

2. Anonymous.

[Pasch. 11 Will. 3. B. R.]

If the *distringas* be returnable within term, and there happen not to be four days between the trial and the end of the term, yet judgment shall be entered that term. Vide post 399.

INDICTMENT in *B. R.* for a misdemeanor was tried three days before the end of the term, and judgment was entered the same term; so that the defendant had not four days to move in arrest of judgment. And the question was, Whether this entry of the judgment was regular, and whether it should not have been stayed till the term following? *Et per Holt C. J.* If there be four days and more between the trial and the end of the term, judgment ought not to be entered within the four days; but if the *distringas* be returnable within the term, and the party is tried within two or three days before the end of the term, the judgment shall be entered that term, though there be not four days to move an arrest of judgment: So it was settled in the case of *Know and Levarr*, upon a conference between *Scroggs C. J.* and Sir *William Jones* Attorney General, contrary to the report of Sir *Samuel Astrey*.

Two manners of taking advantage in arrest of judgment.

Arrest of judgment is either for matter intrinsic, i. e. such as appears by the record itself, which will render the judgment erroneous and reversable; or extrinsic, i. e. some foreign matter suggested to the Court which proves the writ is abated, for it is not enough that it proves the writ is only abateable. The old course of taking advantage in arrest of judgment was thus: The party after a general verdict having a day in court, (for so he has as to matters of law though not of fact,) did assign his exceptions in arrest of judgment by way of plea; and it was called pleading in arrest of judgment. Vide 21 H. 7. 37. b. Yelv. 125. 1 Bullstr. 5. Rast. 47. a. 56. b. 127. a. 197. a. 269. b. 288. a. 432. a. 497. b. Co. Ent. 50. a. 53. a. b. 120. a. 572. a. 657. a. 11 H. 7. 10, 11. 2 Saund. 333. Style 426. This differed from moving in arrest, which was done by one as amicus curiæ, where the party was out of court. Vide Co. Ent. 295. b. the manner of doing it. Vide 2 Ro. 716. 9 E. 4. 11. a. 4 H. 7. 9. 5 H. 7. 23. Rast. 107.

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3. The Queen versus Darby.

[Mich. 1 Ann. B. R.]

Far. 1700. 9. C. Where it is said he was at last admitted to move in arrest.

DARBY being convicted on an information for subornation of perjury, and judgment entered *quod capiatur pro fine*, and a *capias* issued, whereupon he was taken and brought into Court, where he offered to move in arrest

Arrest de Corps.

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arrest of judgment; but the Court was of opinion it was out of time, for that the judgment *quod capiatur* was a final judgment, and the subsequent entry is only for the certainty of the fine (a).

(a) *R. 2 Bur. 799.* that motion in arrest of judgment on the crown side, may be made at any time before sentence pronounced.

4. Wood *versus* Shephard.

[Trin. 2 Ann. B. R.]

IT is against the ancient course of the Court to make a rule to stay judgment, unless the *poslea* be brought in; but the Court, if there be probable cause shewn, will order the *poslea* to be brought in. *Et per Cur.* If one moves in arrest of judgment, he ought to give notice to the clerk in Court of the other side; but the better way is to give a rule upon the *poslea* for bringing it into Court, for that is a notice of itself.

6 Mod. 24. The course of moving in arrest of judgment. Vide Far. 39. Mod. Cases 143. 2 Salk. 431. Holt 71. S. C.

Arrest de Corps.

1. Wilson *versus* Tucker.

[Trin. 7 Will. 3. B. R.]

ARREST on a Sunday is a void arrest, inasmuch that the party may have an action of false imprisonment for it (a).

Arrest on a Sunday, void. Mod. Caf. 96. 5 Mod. 95. S. C.

(a) It is by *stat. 29 Cha. 2. c. 7.* that the service of process on Sunday is void: before that statute, ministerial acts upon a Sunday were lawful; 9 Co. 66. b. 2 Cro. 280. Godb. 280. 2 Bul. 72. A defendant arrested on another day, and escaping, may be retaken on a Sunday; *Mod. Ca. 231.* So a person may be taken upon an escape warrant, *post. 626.* but not after a volun-

tary escape, *Featherstonhaugh v. Atkinson, Barn. 373.* nor a person arrested and liberated, there being at the time of the liberation a detainer at the suit of another person; *Atkinson v. Jamieson, 5 Term Rep. 25.* Bail may seize their principal, *Mod. Ca. 231.* but not sheriff's bail; *Brookes v. Warren, 2 Bl. Rep. 1273.* A person may be arrested on Sunday on the Lord Chancellor's

H 3

warrant,

warrant, on an order of commitment for a contempt, not upon an attachment for non-performance of an award. *Diā. 1 T. R. 265. 1 Atk. 55. A*

person convicted by justices on a penal statute cannot be apprehended on a *Sunday* for want of distress; *Rex v. Myers, 1 T. R. 265.*

[79]

2. Genner *versus* Sparkes.

[Trin. 3 Ann. B. R.]

✓ No arrest can be without actual touching the defendant. *Mod. Cases, 105, 141, 210, 211. Far. 8. 2 Salk. 586. 6 Mod. 173. S. C. Vi. Horner v. Battyn, Bull. N. P. 62,*

GENNER a bailiff having a warrant against *Sparkes*, went to him in his yard, and being at some distance told him, he had a warrant, and said he arrested him. *Sparkes* having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house. And this was moved as a contempt. *Et per Cur.* The bailiff cannot have an attachment, for here was no arrest nor rescous. Bare words will not make an arrest; but if the bailiff had touched him, that had been an arrest, and the retreat a rescous, and the bailiff might have pursued and broke open the house; or might have had an attachment or a rescous against him; but as this case is, the bailiff has no remedy, but an action for the assault; for the holding up of the fork at him when he was within reach, is good evidence of that (a).

(a) If the bailiff who has a process against one, says to him when he is on horseback or in a coach, "You are my prisoner, I have a writ against you," upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process; but if, instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff laid hold of him; *Horner v. Bat-*

tyn, Bull. N. P. 62. The arrest must be by authority of the bailiff to whom the warrant is directed, that is, he must be in company; but he need not be the hand that arrests, nor present, nor in sight of the party arrested; as, where he sent his assistant forward who made the arrest, he being at some distance and out of sight, the arrest was held to be good; *Blatch v. Archer, Corup. 64.*

✓ 3 Cr. 139
Perry v. Adams
6/13/16 528

Assets.

1. Deering *versus* Torrington.

[Trin. 2 Ann. B. R.]

IF *H.* takes a bond for another in trust, and die, this is not assets in the hands of the executor of *H.* So if the obligee assigns over a bond, and covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee.

Bond to A. a trustee, not assets in executor's hands. 3 D. 379. p. 28. S. C.

2. Buckley *versus* Pirk.

[Trin. 9 Ann. B. R. Rot. 28.]

IF executor of lessee for years enter into the tenements, no part of the profits, unless what is over and above the rent, shall be assets; but is received by the executor as tertenant, and appropriated to the use of the lessor. *Vide* title *Executors*.

5 Co. 31. b. Moor 566. Cro. Car. 712. 1 Bulst. 22. Poph. 121. Post 316. S. C. Cases L. E. 12.

3 D. 379. p. 27.

3. Erby *versus* Erby.

[80]

[In Canc. Trin. 1714.]

THE creditors of *J. S.* brought a bill for debts, which debts were mortgages, judgments, and bonds; upon one of the bonds the defendant was outlawed, and upon one of the judgments the recoveror had brought an action of debt; and the question being concerning priority of payment, it was objected, 1st, That the judgments were by confession, and it was not equitable that it should be in the power of the party to prefer one creditor to another; but that seemed to be over-ruled. And as to the outlawry, the Court ruled, that being only upon mesne process before judgment, it did not alter the nature of the debt, nor create a *lien* upon the land in this case: but that where there is an outlawry and a seizure thereupon, the debt attaches upon the land, and shall be preferred to a judgment though prior to the outlawry, but that it is the seizure that gives the preference.

Outlawry upon mesne process does not make the debt a lien upon the land. Raym. 17. 4 Co. 59, 60. 5 Co. 29, 29. Post 495.

Bringing debt upon a judgment is no waiver of lien created by that judgment.

It was also objected, that bringing debt upon the judgment was a waiver of the *lien* created by that judgment; for he can only extend the land that the party had at the time of the latter judgment; but the Court held, that bringing debt upon a judgment did not postpone this to other judgments, and that it was the act of the attorney, and that it would be no waiver, because there was no other remedy after the year and day at common law.

Assignment.

1. *Barker versus Damer.*

[Hill. 2 W. & M. Rot. 635.]

Carth. 182.
3 Mod. 336.
Action of covenant cannot be brought in England for rent reserved on a lease of lands in Ireland. 1 Show. 191. S. C.
* [81]
Cro. Car. 183.
Latch. 197.
W. Jones 43.
Hob. 37.

BARKER made a lease for years of land in *Ireland*, and the lessee covenanted to pay the rent in *London*; *Barker* assigned his reversion, and the assignee brought covenant in *London* for the rent; the defendant pleaded to the jurisdiction, That the lands lay in *Ireland*; and on demurrer the plea was held good, for this is a local covenant, and adheres * to the land. The lessor himself could not have maintained an action for this in *England*, and the statute transfers it to the assignee in the same plight that the lessor had it; and the payment being to be made in *London* alters not the case. *Vide* S. C. *Show* 191 (a).

(a) *Vide* 2 Salk. 451. Cowp. 181. Str. 776. 1 Wils. 165.

2. *Pitcher versus Tovey.*

[Pas. 4 W. & M. B. R. Intr. Mich. 3 Will. 3. Rot. 61.]

1 Show. 340.
4 Mod. 71.
Vide there the record. Lessee assigns to A., A. assigns to B. without notice to the lessor; lessor cannot have co-

COVENANT against the defendant as assignee of *A.* who was executor of *B.* to whom the plaintiff made this lease, wherein *B.* the lessee covenanted for him, his executors and assigns, to pay a yearly rent of 10*l.* and the plaintiff assigned for breach two years rent, after the assignment to the defendant, due and unpaid. The defendant, as to one year's rent, confessed the action, and as to the

the residue he pleaded, that before that rent became due he granted and assigned the said premises to *H.* and all his estate and interest therein; *virtute cujus H.* entered and was possessed; whereupon the plaintiff demurred, and the Court of *C. B.* held, That this plea was naught, because the defendant does not shew that he gave notice to the plaintiff of this assignment, or that the plaintiff had accepted *H.* for his tenant, and the lessee ought not to have it in his power to put a tenant upon his landlord without notice. And there is a privity of estate, though not of contract, between the plaintiff and the defendant, for which reason the Court of *C. B.* gave judgment for the plaintiff: But upon a writ of error in *B. R.* that judgment was now reversed; and the Court held, That there was no privity of estate or contract between the plaintiff and defendant; and these failing, the plaintiff's action must fail likewise, because that must be founded upon the privity of estate or contract, the one or the other; and the Court denied *Kighly's* case. *Sid.* 338. *Ray.* 162. 2 *Keb.* 260. And as to the objection that it might be assigned to a beggar, the Court answered, it was the lessor's own fault and folly to take the first assignee for his tenant, and that the lessor was not without remedy; for that he might bring covenant against the lessee's executors, or might distrain upon the land. And as to the case in *Co. Lit.* 269. *B.* between landlord and tenant, that where the tenant makes a feoffment, the landlord must avow upon his tenant for the arrears due in his time, notwithstanding the feoffment, they said it was so in this case, for covenant will lie against the defendant for the rent due in his time before assignment, but not after (*a*).

repleant against *A.* for arrears of rent incurred after the assignment to *B.*
3 *Lev.* 295.
2 *Vent.* 228,
234. 1 *Sid.* 338.
Raym. 162.
1 *Inst.* 41.
1 *Leon.* 127.
1 *Lev.* 215. 259.
con. 2 *Keb.* 260.
Saying it was a hasty resolution by two judges against *Twissden*, who opposed it totis viribus.
2 *Dan. Abr.* 455. pl. 9. 2 *D.* 485. p. 9. *S. C.* *Carth.* 177.
Cates B. R. 23.
Holt 73.

(*a*) The assignee is discharged by assigning before breach to a feme covert; *Barnfather v. Jordan*, *Doug.* 452. A mortgagee, who has not entered, is not liable to be sued as assignee, although the mortgage is forfeited; *Eaton v. Jaques*, *Doug.* 455. In that case it was said by Lord Mansfield, "In leases, the lessee being a party to the original contract continues always liable, notwithstanding any assignment; the assignee is only liable in respect of his possession of the thing; he bears the burthen while he enjoys the benefit, and no longer; and if the whole is not passed, if a day only is reserved, he is not liable." *Buller J.* said, "The question being, whether mere nominal assignees with the naked right, or only substantial assignees in the ac-

tual enjoyment of the estate, shall be liable to this action? I think only the last shall be liable." Where the defendant, being sued as assignee, pleaded, that before breach he had assigned to *A.* who entered, and was possessed; the plaintiff replied, that the defendant continued in possession, and traversed the entry and possession of *A.* The Court held, that the replication was not sufficient, as it had not charged the second assignment to be fraudulent; *Walker v. Reeves*, *Doug.* 461. *in notis*; where the plaintiff replied, that the defendant had not assigned; and it appeared at the trial, that, being weary of his assignment, he employed a person to find him one who would take it off his hands; and accordingly it had been formally assigned to a prisoner in the

the Fleet. The plaintiff, not having replied that the assignment was fraudulent, was nonsuited; *Lekeux v. Nash*, 2 Str. 1221. A landlord cannot maintain covenant against an under-lessee; *Hulford v. Hattb*, Doug. 182. but if the whole term passes by assignment, the assignee is liable to be sued by the landlord or his representatives, though the rent, &c. is reserved to the assignor; *Palmer v. Edwards*, Doug.

186. note. The assignee was held not liable after assigning over, although the lessor was a party to the first assignment; and it was agreed, that a term mutually defeasible should be absolute, which was contended to be a new grant; *Chancellor v. Poole*, Doug. 764. An administrator in possession is liable *in jure proprio* as an assignee; *Tilley v. Norris*, post 309. Vide 1 Bro. P. C. 74.

[82]

3. Woodward *versus* Marshall.

[Mich. 8 Will. 3. B. R.]

Attornment.
Post 90.

1 Lev. 40.
2 Lev. 234.
145, 240.
Co. Lit. 309. b.

THE plaintiff declared as assignee of a reversion by a fine, for rent due; and upon an ill plea and demurrer, Holt Chief Justice objected, that the plaintiff had set forth no attornment, without which the reversion could not pass. *Dee* for the plaintiff answered, That this being an action of covenant, it was founded on the privity of contract, and differed from an action of debt, which was founded on the privity of estate. Holt C. J. Unless the reversion passed by the assignment, the covenant cannot pass, for there is nothing wherewith it can be transferred (a); but *per Curiam*, Nobody appearing for the defendant, let the plaintiff take judgment.

(a) R. acc. Str. 78.

Assize.

1. Savier *versus* Lenthall & al.

[Hill. 1 W. & M. B. R.]

In assize de-
mandant non-
sued, because
not ready to
count instant

ASSIZE for the office of marshal of the K. B. against *Lenthall* and four others. Counsel was ready at the bar to arraign it in *French*. The recognitors did not appear, but the Chief Justice ordered the writ to be read; and

Attachment.

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and he said, it might be returnable at any common day, or return-day. The plaintiff also did not appear, and the Court ordered the affize to be adjourned till the next day. Then the affize was arraigned, and the tenant demanded that the demandant should count against him. The demandant was not ready, and prayed that it might be adjourned till another day; but it was denied; for this is *festinum remedium*, and the tenant is to plead presently, which he cannot do when he hath nothing to plead to: whereupon the demandant was nonsuit. *Et nota*; the Court told him he might bring a new affize.

on the tenant's demand. 1 D. 591. pl. 4. S. C. 3 Mod. 273. Comb. 173, 207. Lilly 93.

2. Saveris *versus* Briggs.

[83]

[Pasch. 5 Will. 3. B. R.]

IN *affize*, if the defendant plead in abatement, he must plead over in bar at the same time: Also no imparlance shall be allowed without good cause, because it is *festinum remedium*; and if there be several defendants; and any one of them do not appear the first day, the affize shall be taken by default against them.

Appearance, imparlance, pleading in affize. Kev. Dig. 115. c. 5. § 13.

Action on the Case for Words.

Vide Title Words.

Attachment.

Against an attorney for not making good his proposals of bringing money into court. Far. 48.

1. Forster *versus* Brunetti.

[Mich. 8 Will. 3. B. R.]

AT T A C H M E N T lies not for not performing an award, made upon a rule of Court, without a personal demand. *Holt* C. J. remembered the first attachment of this kind was in Sir John Humble's case in *Kelynge's*

Attachment lies for not performing award, tho' not strictly good in law, if not impossible. But

personal demand is necessary. Ante 71. 1 Lill. 120, 124, 125.

Kelynge's time; in which, and ever since, a personal demand has been thought necessary. In such cases of awards, though they be not legally good, attachment lies for non-performance. *Aliter* if impossible; but the party is excused as to that part which is impossible only. *Mich. 9 W. 3. B. R. Harrison versus Bowman (a).*

(a) The course of proceeding to obtain an attachment is this: The award must be tendered to the party against whom it is intended to move for the attachment, and, if he refuse to accept it, affidavit of the due execution of the award, and of such tender and refusal, must be made, and, on that, an application made to the Court to have the order of *nisi prius* (if the reference is at *nisi prius*) made a rule of Court; then a copy of this rule must be served on the party refusing to accept it, an affidavit must be made of personal service of the rule, and of the disobedience to it, and then on application, grounded on that affidavit, an attach-

ment will be ordered of course; 1 *Crompt. Prac.* 269. When the award is accepted, but the money being demanded is not paid, an affidavit must be made of the due execution of the award, and of the demand and refusal of the money; and an unstamped indorsement of an award is a sufficient authority to a third person to demand the money awarded; 2 *Bl. Rep.* 990. *Kyd* 216. When the submission is by rule of Court according to the statute, the affidavits to ground the attachment need not be entitled in any cause; for, till the rule for the attachment is granted, there is no proceeding in court; but the affidavits in answer must be entitled; *Brvan v. Brvan*, 3 *T. R.* 601.

2. Anonymous.

[*Mich. 10 Will. 3. B. R.*]

Exposition of rule *super solutione custag.*

RULE was made to put off a trial, *super solutione custagior* and the costs not being paid, and the trial put off, the plaintiff moved for an attachment, but had it not; for the Court said he should have gone on.

[84]

3. Hall versus Mifter.

[*Mich. 11 Will. 3. B. R.*]

Attachment upon an award of the three foremen, a verdict being given for security. Ante 73. *Barnes* 58. *Kyd* 216.

IF a rule be made at *nisi prius* to refer a matter to the three foremen of the jury, and that the plaintiff shall have a verdict for his security; after the award made the plaintiff may either enter up judgment on the verdict, or have an attachment for not obeying the rule of Court, it being in his election which way he will execute the award; and this was affirmed by Mr. *Northey*, and at the bar, to be the constant practice. *Tourton* and *Gould* (in the absence of the Chief Justice) doubted of it, because the verdict stood still on record. To which *Northey* answered, There

There could not be a judgment entered on such verdict without leave of the Court. And the attachment was granted (a).

(a) To obtain leave, it is necessary to produce an affidavit of the due execution of the award, and the demand of the money awarded, as it is to obtain an attachment; *Barnes* 58. Whenever bail has been given it is usual to take a verdict to the amount of the demand, subject to being reduced by the arbitrator.

4. Anonymous.

[Hill. 9 Ann. B. R.]

MOTION was made for an attachment against the defendant on affidavit, that being served with a rule of Court to shew cause why an information should not be filed against him, he said, *He did not care a fart for the rule of Court.* And Northey Attorney General insisted, he ought to be first heard to shew cause against it. *Et per totam Cur.* He shall answer in custody, for it is to no purpose to serve him with a second rule, that has slighted and despised the first. It is to expose the court to a further contempt. And accordingly the defendant was brought in, and entered into a recognizance to answer interrogatories *. *Vide plus*, title *Contempt* (b).

For contemptuous words spoke of the Court, attachment goes without a rule to shew cause.
1 Lill. 305.
1 Stran. 185.
2 Stran. 1068.

* Which is all that can be had thereupon; and

if he forswear himself, he is subject to a prosecution for perjury. *Far.* 31.

Nota. An attachment was granted against the plaintiff's attorney for putting the name of an attorney of B. R. to the process without his authority. 1 Burrow 20. *Openheim qui tam v. Harrison.* Mich. 30 Geo. 2. *Note to 5th edition.*

(b) *Quære*, If the attachment goes absolutely, when the contemptuous words are only sworn to by one witness. *Vide Str.* 1068. In 3 *Atkyns* 219, the Court, under that circumstance, only granted a rule to shew cause. A person cannot come in and confess the contempt, and submit directly to the judgment of the Court; but is obliged to answer interrogatories; *Rex v. Beardmore*, 2 *Bur.* 796; except in case of a rescue and contempt in the face of the Court. *Rex v. Elkins*, 1 *Bl. Rep.* 640.

Attainder.

1. Rex versus Morphes.

[*At the Old Bailey, coram Holt Chief Justice, Treby Chief Justice, Powell, Powys, Ward, Rokesby, and Tournon, Oct. 9, 1696.*]

Attainder of
treason by com-
mission on 28 H.
8. c. 15. works
corruption of
blood. Co. Lit.
391. a.

ON a commission of *Oyer and Terminer* upon the statute 28 H. 8. c. 15. one *Morphes* was indicted of high treason, and demanded the benefit of the 7 W. 3. c. 3. Whereupon this question arose, *sc.* Whether an attainder upon this statute wrought corruption of blood? *Et per Cur.* No attainder of piracy wrought corruption of blood, for it was no offence at common law. But an attainder of treason works corruption of blood in all cases, where-ever the treason be done, except only attainders before the constable, marshal, or admiral: The reason of which was, because there could be no record made of it; but here there is. Adjourned from the *Old Bailey* to *Holt's chambers*, and there debated.

2. Sir Salathiel Lovell's Case.

[Hill. 8 Ann. in Dom. Procerum.]

One attainted of
treason in coun-
terfeiting the
coin, on statute
8 and 9 W. 3.
shall forfeit his
lands, though
corruption of
blood is saved by
that act.

H. Was seized of lands for three lives, and attainted for counterfeiting the king's coin, on the stat. 8 & 9 W. 3.; by a proviso of which statute corruption of blood is saved, and thence it became a question, Whether *H.* had forfeited the lands, which the king, as forfeited, had granted to baron *Lovell*? The baron brought a bill *in Scacc.* to redeem, and had a decree; and an appeal was brought in the House of Lords, and it was held by the Judges, That in the case of an attainder of felony, the forfeiture of the estate to the lord is only by way of escheat, *pro defectu tenentis*, and the not descending is the consequence and effect of the corruption of blood or incapacity; but in treason the lands come to the crown as an immediate forfeiture, and not as an escheat. And the forfeiture and corruption of blood are distinct parts of the penalty; so that the forfeiture may be saved, and yet the corruption remain; or the corruption be saved, and the forfeiture

Contra H. P.
C. 3.

forfeiture remain. And accordingly it is so provided by several statutes; and by consequence that the lands were forfeited in the principal case.

Attorney and Solicitor. *Vide* [86]
Title Privilege.

1. Berkenhead *versus* Fanshaw.

[Hill. 2 W. & M. B. R. Rot. 750.]

INDEBITATUS *assumpsit* was brought by an attorney, for fees and disbursements, in defending suits in an inferior court, and in the Court of B. R. the defendant pleaded 3 J. 1. c. 7. *Et per Cur.* 1st, The statute may as well be pleaded to an *indebitatus assumpsit* as to the action of debt, unless a special promise be laid; but to a special promise or an *insimul computasset*, it is no plea. 2dly, The statute does not extend to attornies in inferior courts, but only to attornies in the courts at Westminster, so that it is no plea as to the plaintiff; *ergo* judgment *pro quer* (a).

1 Show. 96.
Stat. 3 J. 1.
c. 7. extends
only to attornies
of the courts at
Westminster.
Carth. 147.
S. C. 57.

(a) By *Str.* 2 G. 2. c. 23. s. 22. the bill must be delivered to the party, or left at his house, a month before the commencement of the action. The Court will stay proceedings until a bill is delivered; *Clark v. Godfrey*, 1 *Str.* 633. A bill may be set off, though not delivered a month before, if delivered time enough to be taxed; *Martin v. Winders*, *Doug.* 198. The bill must be *actually left*, for where it was delivered to the defendant, who acknowledged the debt and promised to pay, but said he did not know what to do with the bill, the plaintiff, who took it back, was nonsuited; *Brooks v. Mason*, *H. Bl.* 290. The statute does not extend to business done in conveying, or to the executor of an attorney,

and it may be given in evidence on the general issue; *Bull. N. P.* 145. If a bill is partly for business done in court, and partly for conveying, parliamentary business, fees paid to a proctor, &c. the Master may tax the whole; *Doug.* 199. The Court will refer a bill for business at the Quarter Sessions to be taxed; *Jackson v. Williams*, 4 *T. R.* 496. The reasonableness of the bill is not inquirable into at *nisi prius*, or on a writ of inquiry; *Hooper v. Till*, *Doug.* 198. It is sufficient to prove the existence of the cases and business for which the charges are made, and the main articles, and is not necessary to prove every single item; *Philips v. Roach*, *Espinasse* 9. *Anon. ibid.*

2. Latuch *versus* Pasherante.

[Mich. 8 Will. 3. B. R.]

Attorney's consent binds the client though contrary to his express orders.

ASSUMPSIT. The defendant pleaded *non assumpsit infra sex annos*; the plaintiff replied, and for want of the defendant's joining issue in due time, the plaintiff's attorney signed judgment, but afterwards consented to accept the joinder in issue: But, upon motion to the Court to compel him to accept it, it was opposed, because the plea was a hard plea, and the client had notice of the advantage, and ordered the attorney to insist upon it. The Court said, that since it was a hard plea they would not have compelled him, if he had not consented to waive the advantage, but now they would hold him to his consent: And as for the client, he was bound by the consent of his attorney, and they could take no notice of him (a).

2 Roll. Abr. 747. Fz. 2. Mod. Cases 16, 40, 86.

(a) *Vide* Carth. 412. Skin. 679. Comb. 439.

3. Anonymous.

[Mich. 10 Will. 3. B. R.]

5 Mod. 205.
6 Mod. 16, 40.

PER Holt Chief Justice, 'The course of this Court is, where an attorney takes upon him to appear, the Court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him.

[87]

4. Anonymous.

[Trin. 11 Will. 3. B. R.]

Mod. Cases 86.
Str. 114. 693.

MOTION was made to compel an attorney to appear for *J. S.* And the Court held he was not compellable to appear for any one, unless he takes his fee, or backs the warrant; and then they will compel him.

5. Goring *versus* Bishop.

[Mich. 10 Will. 3. B. R.]

Writings left in attorney's hands.
2 Strang. 547, 621.

WHERE writings come to an attorney's hands in the way of his business as an attorney, the Court upon motion will make a rule upon him to deliver them back

back to the party : But where they come to his hands in any other manner, or on any other account, the party must resort to his action (a).

(a) 3 T. R. 275. *cont.* as to last point. *Vide Str.* 547, 621. *Doug.* 104.

6. Oades *versus* Woodward.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 766. S. C.]

WOODWARD gave a warrant of attorney to confess a judgment, and died within a year after in time of vacation, before the effoin-day of the subsequent term, which was *Easter* term ; the attorney after his death entered up the judgment as of the precedent term, but brought not the roll in before the effoin-day of *Easter* term ; and it was now moved to have the judgment set aside, the warrant of attorney being revoked by the death of the party. *Et per Holt C. J.* 111, By the course of the Court a warrant of attorney to confess a judgment is not revokable, and the Court will give leave to enter up the judgment *, though the party does revoke it ; but it is determinable by the party's death ; but if the party dies in the vacation, the attorney may enter up the judgment that vacation as of the precedent term, and it is a judgment at the common law, as of the precedent term, though it be not so upon the statute of frauds in respect to purchasers, but from the signing ; so that this judgment being a judgment at common law as of *Hilary* term, it was a judgment entered when the party was alive, and therefore good without all question, if the roll had been brought in before the effoin-day of *Easter* term ; but that not being done, the question will be, Whether we can now admit it to be filed ? By the course of the Court, all the rolls of *Hilary* term ought to be brought in before the effoin-day of *Easter* term, and made part of the bundle of *Hilary* term ; and it is for this reason that what is done in the vacation is looked upon as an act of the term preceding ; and there cannot be a *post terminum* roll received without leave upon motion, which the Court does not grant, but when it appears that nobody can be prejudiced, for it is dangerous ; and he said that practice should never have his consent to be allowed again ; for by this means the statute of frauds and the act for docketing of judgments will be frustrated ; for if the Court allow the filing of this roll in *Easter* term as a judgment of *Hilary*, when it was not among the rolls of that term, how shall purchasers avoid the consequence of it, when it was neither docketed nor

Far. 93. Judgment by confession upon a warrant of attorney, may be entered in the vacation as of the term precedent, tho' the defendant died in that vacation.

* 1 Vent. 310. Far. 2. S. C. by the name of Dr. Woodward's case. Mod. Cases 14. 3 Salk. 116. Holt 401.

Post terminum roll cannot be filed without leave of the court. Far. 39.

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brought in? Upon this account the Court disallowed the filing (a).

(a) *R. ac. Str.* 882. 3 *P. W.* 398. *Barnes* 266. *Vi. Str.* 1081. *Vi. Rep.* B. R. temp. *Hurd.* 158.

7. Anonymous.

[*Trin. 2 Ann. B. R.*]

Judgment shall not be set aside because attorney appeared without warrant, if he be sufficient. *Mod. Cases* 16.

AN attorney appeared, and judgment was entered against his client, and he had no warrant of attorney; and now the question was, If the Court could set aside the judgment? *Et per Cur.* If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but if the attorney be not responsible or suspicious, we will set aside the judgment; for otherwise the defendant has no remedy, and any one may be undone by that means.

8. Parson *versus* Gill.

[*Trin. 2 Ann. B. R. 2 Ld. Raym.* 895. *S. C.*]

Memorandum amended by the warrant of attorney on the same roll. *Ante* 47, 50, 77. *Far.* 121. *c Mod.* 17. *= Salk* 520.

AT the top of the plea-roll it was entered, that the plaintiff *po. lo. suo J. S. attornatum suum*, and the memorandum was, that the plaintiff *venit & protulit, &c.* but did not say *venit per attornatum suum*, or *in propria persona sua*. Upon this there was a *non sum informatus* entered, and judgment *pro quer.* And error being brought in the Exchequer Chamber, it was moved to amend the declaration by the top of the plea-roll: And it was objected, that this was but an entry of the clerk, and there might be no warrant given or filed: But *Holt C. J.* held it might be amended by the plea-roll. In *C. B.* the warrant of attorney is always filed by itself on a distinct file, but the course of this Court was always to enter them on a particular roll for that purpose, till *C. J. Wright's* time, and he altered the ancient course, and caused them to be entered on the top of the respective plea-rolls to which they belong, and it is practised at this day. Till a warrant of attorney is filed or entered, it is not a matter of record: But a man may appoint an attorney in court upon record; and a warrant of attorney upon the plea-roll is as well and as much a record as it would be upon any other roll: and it cannot be intended but that the plaintiff declared by attorney, the attorney's

attorney's name being to the judgment-paper, viz. *J. S. pro quer (a)*.

(a) See *Bl. Rep.* 453.

9. *Lamb versus Williams.*

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[*Hill. 2 Ann. B. R.*]

IN trespass in *C. B.* verdict was for the plaintiff, and his attorney entered a *remittit damna* as to part, and judgment for the rest; and it was held, That the attorney has authority by his being constituted attorney to remit damages; and that a *remittitur* need not be by the plaintiff in *propria persona*, as a *retraxit* must.

Mod. Cases 32.
S. C. Far. 82.
8 Co. 58.
1 Roll. Ab. 584.
Remitted damna may be by attorney, retraxit must be in *propria persona*.

10. *Gregg's Case.*

[*Pal. 5 Ann. B. R.*]

EXECUTOR of an attorney brought an action for fees and law-business done by his testator; defendant moved to refer the plaintiff's demand to the Master; but denied, because all the business was done in another court; otherwise had the business been done in this court, or partly in this: And besides, the plaintiff was an executor (*b*).

Reference of attorney's bill to the master. *Post.* 596. *S. C. Holt* 472.

(b) *Vide Doug.* 198.

11. *Burr versus Atwood.*

[*Pasch. 5 Ann. B. R.*]

ERROR on an award of execution against bail. The record of the principal judgment was returned, and it was objected, That the plaintiff at the return of the *scire facias* appeared by *J. S.* his old attorney, and prayed an *alias*; and that *J. S.* acted on as attorney throughout the whole, and yet had no other warrant than the old one, which was given him in the original action. *Et per Holt C. J.* Any one might sue out or pray the *scire facias*, and therefore the old attorney might; but when the *scire facias* is returned, then the plea commences, and a new warrant of attorney ought to have been entered, which is by entering, *quod querens ponit loco suo, &c.* For the warrant to appear in the principal action is no warrant to appear in the *scire facias* against the bail; because this is a new cause

Far. 3. Warrant of attorney for the plaintiff in the action against the principal cannot extend to the suit against the bail, but there must be a new one. *Carth.* 447.
2 Salk. 603.
5 Mod. 27.
6 Mod. 304.
Cumber. 149.
161. *Post.* 402.
603. *3 Salk.* 369.
Lill. Entr. 225, 403, 890.

cause and a different record. Also the Chief Justice said, That upon this writ of error, the record of the judgment against the principal ought not to have been certified. Judgment reversed.

N. With respect to attornies and solicitors, see stat. 2 Geo. 2. cap. 23. 6 Geo. 2. cap. 27, &c.

Nota. An attorney of B. R. having by collusion taken a turnkey of the King's Bench Prison for his article-clerk, the articles were cancelled by order of the Court, and ordered to be kept there. 1 Burro. 291. *Note to 5th edit.*

1. *Gwam and Ward versus Roe.*

{Trin. 5 Will. 3. B. R.}

Lessor makes a second lease, and before the first expires levies a fine; attornment by the first lessee to the conusee is sufficient. Ante 82. 2 And. 15. Co. Lit. 309. b. Co. Lit. 3. I. 314. 316. Allen 59. 1 Leon. 265. 3 Salk. 51. S. C. Skin. 387. 1 Dan. Ab. 612.

VI. Str. 106.

A. Makes a lease for years to *B.* reserving rent, and afterwards leases to *C.* rendering rent; then *A.* levies a fine to the conusee and his heirs, to the use of the conusee and his heirs; the first lease expires, the second lessee enters, and the conusee brings debt against the second lessee for rent-arrear. Upon demurrer, it was objected on the part of the defendant, that here was no attornment of the second lessee alleged, and that it ought to be in this case, because the plaintiff came in by the common law, and not by the statute of uses, *quod fuit concessum*: Also it was said the plaintiff could not without attornment have maintained an action against the first lessee; *quod Curia concessit*, but held there was a plain difference between the first lessee and the second: At the time of the fine, the reversion was expectant on the first lease, notwithstanding the grant of the second lease; for that continued only an *interesse termini*, and did not alter the reversion, which remained entirely expectant on the first lease, as it was before; therefore the fine passed but one reversion, and that expectant upon one particular estate, and consequently there could be but one attornment, *viz.* from the first lessee, and not from the second. Judgment *pro quer.*

2. Hudson *versus* Jones.

[Mich. 5 Ann. B. R.]

IN *replevin* the avowant made title by grant of a reversion in the *locus in quo* expectant on an estate for life to the plaintiff, unto which reversion there was a rent incident, *ad quam quidem concessionem* the plaintiff (being particular tenant) did attorn: The plaintiff pleaded *non concessit modo & forma*; and the question on trial before Holt C. J. was, Whether the want of attornment might be given in evidence upon this issue? And being made a point for the resolution of the whole Court, it was urged for the plaintiff, That upon *non concessit* the operation and effect of the grant is put in issue, and a deed, if it be ineffectual, is void. If the grantee dies before attornment, it can never be made good; if a second grant be made, and attornment obtained to that, the first grant is avoided. That upon *non feoffavit* livery must be proved; *per quod, &c.*

On the other side it was said, That in pleading a grant of a reversion, an attornment is always alleged, but not of a feoffment: And if a feoffment be of a manor, it is neither necessary to allege a livery nor an attornment, because it is *res integra*, and the tenants are supposed to be numerous; yet if the feoffee avow on any particular tenant for rent, &c. he must shew his attornment. *Yelv.* 135. Also in pleading a grant of a reversion, the plaintiff must allege a venue for the attornment, which shews it was traversable, and that which is traversable, and not traversed, is admitted. To this opinion the Court inclined; but held that upon *riens passa per le fait*, want of attornment might be given in evidence, because the operation of the deed is put in issue; and livery differs, for that is the act of the feoffor to complete his feoffment, but this is the act of another, and nothing farther remains on the part of the grantor.

Afterwards the Court held, That an attornment need not be given in evidence upon *non concessit*, though it must be pleaded; and though it must be pleaded, yet it need not be pleaded with a venue, but shall be tried where the land lies, upon which it is supposed to be made as a surrender is. And the reason of their opinion was, because it is traversable, and whatever is traversable, and not traversed, is admitted (*a*), and the grant is perfect as far as the grantor can perfect it. *Vide 1 And. 220, 221. 1 Lev. 192. Hutt. 102. 2 Co. 61. Dy. 91.*

Upon issue non concessit, an attornment need not be given in evidence.

Co. Lit. 309 & 10.

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Rep. B. R. temp. Ha. d. 116.

Co. Lit. 303. b. In pleading a feoffment of a manor, it is not necessary to shew the attornment of the tenants. Lit. Rep. 31. Whatever is traversable, and not traversed, is admitted. 3 Mod. 36. Lit. Rep. 167. 8 Co. 82. b. 1 Lev. 42. Raym. 18. 1 Dan. Abr. 627, 628.

Attornment pleadable without venue, and triable where the land lies. 2 Lev. 174. 1 Saund. 20, 22, 23. Cro. El. 410. Cro. Jac. 637.

With respect to attornment, see the stat. of 4 Ann. cap. 16. sect. 9, 10. And 11 Geo. 2. cap. 19. sect. 11.

(a) *Vide* Ld. Raym. 504, 296. Str. 298.

Audita Querela.

1. Langston *versus* Grant.

[Mich. 3 W. & M. B. R.]

Audita querela
is no *superfedeas*.
F. N. B. 104. O.
1 Lill. 151.
3 Mod. 111.

AUDITA *querela* is no *superfedeas*; and therefore execution may be taken out, unless a *superfedeas* be sued forth; and if the *audita querela* be founded on a deed, it must be proved in court before a *superfedeas* shall be granted.

2. Clerk *versus* Moor.

[Mich. 6 W. 3. B. R.]

Carth. 303. S.C.
In *audita querela*, where the party is in custody, *scire facias* is the proper process. Otherwise *venire* and distress infinite. Moor 811.
1 Lill. 151.

MOOOR had judgment in debt against Sir Richard Clerk and one Beale, and Beale was taken in execution, and was set at large by the plaintiff's own consent. Hereupon Sir Richard Clerk sued an *audita querela quia timet* against Moor, praying he might also be discharged from the judgment, &c. He sued out two writs of *scire facias*, and two *nichils* were returned; and he moved for a *superfedeas*, relying on 1 Leon. 142. But it was denied *per Cur.* for the process of *scire facias* is improper. Where the suit is *quia timet*, and the party at large, the proper process is *venire*, and distress infinite; but where the party is in execution, there he may either have a *scire facias* or a *venire*. And Co. Ent. 88. is the only *scire facias* on a matter *in pais* where the party was not in execution. Vide Mo. 811. 2 Cro. 29. 3 Cro. 634. 2 Saund. 144. Mo. pl. 447.

3. Anonymous.

[Hill. 10 Will. 3. B. R.]

Process in *audita querela*. 1 Lill. 151. Carth. 303.

IF an *audita querela* be founded upon a record, or the party be in custody, the process upon it is a *scire facias*; but if it be grounded on matter of fact, or the party not in custody, the process is a *venire*. Moor 811. Trin. 12 W. 3. B. R. held so again.

4. Anonymous.

[Pasch. 12 Will. 3. B. R.]

WHERE the party has a matter which he might have pleaded to the *scire facias* in his discharge, and two *nichils* are returned, and judgment against him, the Court will relieve him upon motion, without putting him to an *audita querela*; *aliter* in case a *scire feci* be returned (a). Post 262.
Where two nichils are returned, the Court will relieve upon motion, without audita querela.
Cro. Jac. 59. 5.

(a) *Vide* Ld. Raym. 1295. Str. 1075. Bl. 1183.

The indulgence now shewn by the courts, in granting a summary relief upon motion in cases of evident oppression, has almost rendered the writ of *audita querela* useless, and driven it quite out of practice. But there are a few cases in which this must still be the remedy. *Crompt. Prac.* 435.

Abowry. *Vide* Replevin and Homine Replegiando, p. 58c.

1. Foot's Case.

[Pas. 2 W. & M. B. R.]

REPLEVIN for taking of his horse in *quodam loco vocat.* the common marsh; the defendant pleaded, that he took it in *quodam loco vocat.* the plot, *absque hoc*, that he took it in *prad. loco vocat.* the common marsh. *Unde petit iudicium de nar. pradiet. &c. Et pro retorno habendo* he makes a conuzance under his master's command by distress for rent arrear; the plaintiff replied in bar of the conuzance, and traversed the seisin, which the defendant alleged in his master; to which it was demurred. *Et per Cur.* The traverse of the place was only in abatement, and the defendant did do right to make conuzance *pro retorno habendo*; for otherwise he could not have a return and damages: But the plaintiff should not have traversed the matter of this conuzance, and therefore having done

In a plea in abatement in replevin (except that of property) the defendant must suggest matter for a return, but that is not traversable. 1 Vent. 127, 249. Mod. Cases 195, 198. Show. 91. Post 94-218. 210. Carth. 139.

Vide Barnes 353.

so, and demurrer joined upon it, *Holt* Chief Justice held it a discontinuance.

2. *Cowne versus Bowles & al.*

[Mich. 2 W. & M. B. R.]

2 Saund. 212.
Mat. er of abate-
ment not assign-
able for error af-
ter pleading in
chief. Raym.
198. 1 Sid.
449. 2 Lev.
299. 1 Mod.
47, 296. Carth.
179. S. C. 122.
4 Mod. 7.
1 Show. 8, 165.
Comb. 100.
Cases B. R. 1.
Holt 358. Post

REPLEVIN against three defendants, viz. *A. B.* and *C.* the defendants appeared by attorney and made conuzance, and upon issue and trial the plaintiff was nonsuit, and judgment for the three defendants: the plaintiff brought a writ of error, and assigned for error, that *A.* one of the defendants, was an infant, * and yet had appeared by attorney. *Et per Cur.* The plaintiff shall not assign this for error; because he might have pleaded this in abatement to the conuzance in the *replevin*, for the avowant or conuzant is an actor to that purpose. *Vide 3 Mod.* 248. 48 E. 3. 10. 1 *Roll's Ab.* 781.

Holt 205. 2 Cro. 441. 1 Roll. Abr. 288. 1 Lev. 181. 1 Keb. 759.

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3. *Butcher versus Porter.*

[Hil. 4 W. & M. B. R.]

Carth. 245. S. C.
1 Show. 400.
Ante 5. 1 Vent.
249. Where the
defendant pleads
property, he need
not make a sug-
gestion pro ret.
habendo. Mod.
Cases 81. 2 Cro.
519. 2 Roll.
Rep. 64. Lill.
Ent. 353. Mod.
Cases 103.

REPLEVIN; the defendant pleaded in abatement *property in a stranger*: upon demurrer the Court resolved these two points: 1st, That the defendant may plead property in a stranger, either in bar or abatement. 2dly, That where a collateral matter is pleaded in abatement, the defendant shall not have a return without making an avowry; but where the plea in abatement is to the point of the action, as property is, the defendant shall have a return without avowry; for whether the property be in the defendant or a stranger, the defendant ought to have a return, because he had the possession, which was illegally taken from him by the *replevin*, when the plaintiff had no right (a).

(a) Though this case appears to be established law, it does not seem founded on very accurate reasoning. For the plaintiff, being in possession of the goods at the time of the caption by the defendant, may be considered as having a right against all persons but the actual owner; and it has not much semblance of justice that *A.* should

seize upon goods which are in the possession of *B.* and justify that seizure by a title in any perfect stranger. It would, if the preceding observations are just, be a more correct proposition, that the goods were illegally taken from the plaintiff by the distress, than that they were illegally taken from the defendant by the *replevin*.

4. Anonymous.

[Hill. 8 Will. 3. B. R.]

- **I**N *replevin*, the defendant pleaded, that the cattle were taken in *auter lieu, absque hoc, &c.* *Et per Cur.* This is not enough, but the defendant must go on and make an avowry *pro retorno habendo*; yet such avowry is only a suggestion to bring him within the statute of *H. 8.* for damages. Before that statute no damages were given, and without such a suggestion he is not within the statute; but that being only for a particular purpose is not traversable. *Ante, pl. 1.*

Where defendant pleads *prisal in auter lieu*, he must make suggestion for return. *Ante 93. pl. 1. Str. 507.*

5. *Week versus Speed.*

[Mich. 13 Will. 3. B. R.]

REPLEVIN for taking cattle in *quodam loco vocat.* the brills, in *quodam alio loco ibidem vocat.* the boggs: The defendant avowed the taking in *predicto loco in quo, &c. quia H.* was seised in fee of the *locus in quo, &c.* The plaintiff demurred, because here are two places alleged, and the avowant has only answered to the *locus in quo, &c.* which is but one of the two places. *Et per Curiam,* It is a discontinuance.

Discontinuance in *replevin.* Post 179. 3 Lev. 39, 55. Post 179, 180. Far. 124. Mod. Cases 195. Post 179. S. C. 2 Lutw. 1218. N. L. 384. Holt 561. 1 Ld. Raym. 679.

6. *Pratt versus Rutledge.*

[95]

[Trin. 13 Will. 3. B. R.]

IN *replevin* the defendant avowed, and the plaintiff being nonsuit brought a writ of second deliverance; whereupon it was moved to stay the writ of inquiry of damages. *Et per Cur.* This is a *superfedeas* to the *retorno habendo*, but not to the writ of inquiry of damages, for these damages are not for the thing avowed for, but are given by the statute of 21 *H. 8. c. 19.* as a compensation for the expence and trouble the avowant has undergone. *Vide Pat. 403. Lat. 72.*

Second deliverance is a *superfedeas* to the *retorno habendo*, but not to the writ of inquiry. Godb. 185. Cases B. R. 546. S. C. Barnes 427. acc. Vid. 2 Will. 117. Bull. N. P. 58.

Authority.

Parker *versus* Kett.

[Pasch. 13 Will. 3. B. R. 1 Ld. Raym. 658. S. C.]

It is essential to a deputy to have the whole power of his principal, and a covenant or condition to refrain it, is void. 3 Salk. 124. S. C. Holt 221. Comyns 84, 85. 12 Mod. 466.

EJECTMENT; upon trial, this case was made for the opinion of the Court, viz. *Charles Kett* being seised in fee of a copyhold, demised it to his wife for life, remainder to *Charles* his son in tail, and if he died without issue under age, remainder to *Elizabeth* his wife in fee. Mr. *Keck* the Master in Chancery was steward of this manor by patent, *ad exercendum per se vel deputatum*. Mr. *Keck* appointed one *Clerk* to be his deputy, who acted as such many years, and was sent for by *Charles Kett* to take a surrender of the lands. *Clerk* went not himself, but by a writing under his hand and seal appointed *A.* and *B.* to be his deputies jointly and severally, only to take this surrender, which was done by *A.* accordingly, and afterwards presented; and *Elizabeth Kett* the defendant admitted thereupon, by *Clerk*. *Et per Holt* C. J. who delivered the opinion of the Court,

1st, *Clerk*, who was Mr. *Keck's* deputy, (and so it is of any other deputy, where a deputy may be appointed,) had full power to do any act or thing which his principal might have done. That is so essentially incident to a deputy, that a man cannot be a deputy to do any single act or thing, nor can a deputy have less power than his principal: And if his principal makes him covenant that he will not do any particular thing which the principal may do, the covenant is void and repugnant: As if the under-sheriff covenant that he will not execute any process for more than 20 *l.* without special warrant from the high-sheriff; this is void, because the under-sheriff is his deputy, and the power of the deputy cannot be restrained to be less than that of his principal, save only that he cannot make a deputy, because it implies an assignment of his whole power, which he cannot assign over. That by consequence *A.* was as well authorised by *Clerk's* writing, given him under hand and seal, as if Mr. *Keck* himself had given it; of which there could be no question, it being to do a particular act.

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Hob. 12.

Deputy cannot make a deputy, but he may empower another to do a particular act. Cro. Ll. 534.

2dly, Though *A.* acted in his own name, without reciting his power or any relation to it, yet this taking of a surrender must be good; for he must be considered either as an attorney, or under-deputy. Suppose the first, the law is plain; where a man does such an act as he cannot do, so as to be effectual any otherwise than by virtue of his authority, that shall be taken to be in execution of his authority: But where a man has an interest and authority, and does an act without reciting his authority, it shall be taken to be done by virtue of his interest. 6 Co. 17. And though an under-sheriff must act in the name of the high-sheriff, because the writs are directed to the high-sheriff, and for other particular reasons; yet any other deputy may act either in his own name or the name of his principal. So is the judgment of *Comb's* case, though in arguing it is said otherwise; and so it is of an attorney, but it is more regular to act in the name of the principal. Lastly, Supposing him to be an under-deputy, as if he had not been constituted to do a particular thing, but to be *Clerk's* deputy, this had been void, and he had no real authority: yet even that constitution would have given him the colour and reputation of an authority to act as a steward *de facto*. And what he does as such is sufficient among the tenants, for they have no power to examine his authority, nor is he to render them any account of it. The cases of *Mo.* 109, 110. 1 *Lev.* 288. 2 *Cro.* 552. 2 *Ro.* 7. 101. 130. are stronger. And so it is of an executor *de facto*, i. e. a tort executor.

Authorities by letter of attorney are either general or special; thus a letter of attorney may be to sue *in omnibus causis motis & movendis*, or to defend a particular suit. Sir *Philip Sidney*, when he went to travel, gave a letter of attorney to Sir *Thomas Walsingham* to act and sell all his lands, and all his goods and chattels; and this was held good: Where the authority is particular, the party must pursue it: If the act varies from it, he departs from his authority, and what he does is void; but that must be intended of a variance not in circumstance, but of a variance material and substantial, as where the person, the thing, the estate, or the date is mistaken; as if a warrant of attorney be to *Hugh Barker*, and the execution is pleaded to be by *Hu. Bar.* *Vide title Variance*, 73.

Cro. El. 378.

Moor 70, 71. *Godb.* 38. Deputy may act either in his own name or that of his principal. 1 *Roll. Abr.* 330. 9 Co. 76.

Acts of a steward *de facto* sufficient amongst the tenants of the manor.

In the case of a particular authority, circumstantial variance will not make the act void. *Co. Lit.* 49. b. 303. b.

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1 *Roll. Abr.* 501.

Bail in Civil Cases.

1. Anonymous.

[Mich. 11 Will. 3. B. R.]

Freshy 62. On a removal out of an inferior jurisdiction, plaintiff here is bound to accept the bail below, except in London. Mod. Cases 122. Post 99.

IF the plaintiff in the action sue the bail-bond, he cannot refuse the same persons to be bail to the original action; but if the plaintiff proceed against the sheriff by amerciaments, he is not compellable to accept those persons that are sureties to the sheriff, to be bail to his action: So if a cause be removed by *habeas corpus* out of the *Marsalsea* or any other inferior court, and the bail there offer to be bail to the action, here the plaintiff is compellable to take them, because he might but did not except to them below. *Aliter* where a cause comes hither out of *London*; for the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting against them; and the clerk is not responsible if they be deficient in this court, though he was in *London*; *per Holt C. J. (a).*

(a) *Vide Barnes 63.*

2. Tilly *versus* Richardson.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 840. S. C.]

Err. 120. Upon error in parliament of judgment affirmed in B. R. new bail is required. Mod. Cases 70, 80. 1 Stran. 527.

DEBT on a bond in *C. B.* Judgment for the plaintiff. Error was brought in *B. R.* and bail put in according to the statute, and judgment affirmed; thereupon error was brought in parliament, and the clerk of the errors refused to allow the writ, unless the party would give a new recognizance; and *Broderick* moved it ought to be allowed without; being not requirable by the 3 *Jac.* 1. c. 8. *See per Cur.*

The first recognizance does not include payment of costs to be assessed in the House of Lords, and those costs ought to be paid, and therefore a new recognizance ought to be given within the intent of the statute: and it is not the business of this Court to examine whether bail was put in upon the first writ, for the want of that does not hinder the

the process of the writ of error, but only makes it no *superfedeas*.

IN any action or suit the plaintiff must except within twenty days after bail put in, and notice thereof and of their places of abode, or otherwise the bail shall be filed. Upon a habeas corpus the plaintiff hath 28 days to except against filing the bail offered, upon a *cepi corpus* 20, per Clerk secondary. Trin. 11 W. 3. B. R. In error where the plaintiff finds bail, the defendant hath twenty days to except, and he need not give the plaintiff notice that he excepts; but he cannot take out execution without serving the plaintiff with a four-days rule to put in better bail. Mich. 3 Ann. B. R. And in other cases if the plaintiff excepts, he must give the defendant notice, to save the perpetual trouble of searching the judges books.

6 Mod. 24.
Rules of practice
about putting in
bail, and except-
ing thereto.
Vide 1 Lill. 174,
185.

3. Williams *versus* Williams.

[Pasch. 8 Will. 3. B. R.]

A. Sued B. in three actions, and he put in three bails; plaintiff recovered in them all; defendant rendered himself, and one of the bails entered an *exoneratur* on the bail-piece, the rest did not; *et per Cur.* The rendering is a discharge in *posse* as to all, but not complete and actual as to all, till *exon.* entered upon all (a).

Render, when a
complete dis-
charge of the
bail. 3 Bulst.
102. 1 Lill.
187. Post. 101.
pl. 14.

(a) Notice of the surrender must be given to the plaintiff's attorney without delay, and affidavit made thereof before the bail can be discharged.— After the notice given, and affidavit thereof made, [and an entry of the surrender made if in B. R. on the marshal's book kept in the King's Bench Office,] a certificate must be got from the keeper of the prison, that the defendant is in his custody, and the bail-piece from the chambers (if the surrender was made there) properly marked; on producing of which, together with the affidavit of service of the notice on the plaintiff's attorney, to the master of B. R. or filazer of C. B., an *exo-*

neratur will be marked on the bail-piece; for till that done the bail continue liable: 1 *Crompt.* 72. If an *exoneratur* is ordered, but by omission of the proper officer not entered on the bail-piece, subsequent proceedings will be set aside; 1 *Bur.* 409. Where a bankrupt is clearly entitled to his discharge, the Court, to avoid circuitry, order an *exoneratur* to be entered on the bail-piece without the form of a regular surrender; but if a second commission is taken out against an uncertificated bankrupt, a certificate under such commission does not entitle him to be discharged: *Martin v. O'Hara*, *Cowp.* 821.

4. Page *versus* Price.

[Mich. 8 Will. 3. B. R.]

Bail by executors
and in inferior
courts. Far. 9.
1 Sid. 63, 368.
2 Keb. 295.
3 Lev. 245.
3 Bulst. 316.
1 Bll. 184.
Poit. 102.
6 Mod. 242.
Cro. Jac. 350.
Pl. 2. 3 Salk.
57. S. C. Holt
303.

ACTION against an executor in an inferior court, and special bail put in. It was removed by *habeas corpus* in *C. B.* and the Court held, he should put in bail to appear to a new original within two terms, (but not after,) nor to pay the condemnation-money. In the same case it was held, that in debt against an executor on a judgment suggesting a *devastavit*, he shall give bail, for there the action is in the *debet & detinet*. *Et Trin. 11 W. 3. B. R. fuit dit per Holt C. J.* That in all cases where a cause comes in by *habeas corpus*, the defendant shall find special bail, save in the case of an executor; and that this they do in favour and indulgence to inferior jurisdictions.

5. Holland *versus* Serjeant.

[Mich. 10 Will. 3. B. R.]

Carth. 469.
S. C. Construc-
tion of statute 4
and 5 W. 3. c.
21.

[99]*

H. In custody of the sheriffs of *London* upon an execution was charged according to 4 and 5 *W. 3. c. 21.* in their custody, and for want of proceeding in two terms after, he * was discharged upon common bail, according to the course where persons are charged in custody of the marshal; for by this act the plaintiff has the same benefit as if the defendant was *in custod. mar.*; and therefore it is but reasonable there should be the same rule for the defendant.

6. Etherick *versus* Cowper.

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 425. S. C.]

How the sheriff
shall be charged
for taking insuffi-
cient bail.
10 Co. 99, 100.
2 Salk. 608.
Mod. Cases 122.
Ante 97. 1 Dan.
280, 183. pl. 29.

IF the sheriff takes insufficient bail for the defendant's appearance, and the plaintiff will not accept them, he is liable to an action as well as to amerciaments; *per Holt* Chief Justice; *sed Trin. 2 W. 3. B. R. Gravener versus Soams*, it was held, that no action lay against the sheriff for taking insufficient bail; but he shall be amerced if he has not the body; but if the plaintiff take an assignment of the bail-bond, though the bail be insufficient, the Court will not amerce him (a).

Note. The plaintiff now takes an assignment of course, but the old way was first to give a rule to the sheriff to

(a) *Vide 1 Will. 223. Crisp. 769.*

bring

bring in the body, before you could take an assignment; so at this day you serve the sheriff with a rule to bring in the body, before you move to amerce him. *Per Cur.*

7. Anonymous.

[Mich. 10 Will. 3. B. R. Ld. Raym. 383. S. C.]

DEFENDANT shewed the composition act, and that the plaintiff's debt, according to the composition he had made with the rest of his creditors, was under ten pounds; and that the plaintiff would be bound though a non-subscriber: Yet the defendant was held to special bail, because *non constat* that the plaintiff will be bound, for he may deny the absconding, &c. So that this would be to determine the merits of the cause, viz. that he was bound by the composition. *Aliter*, if the plaintiff had subscribed, or had been summoned before a judge, and the matter had received a determination (a).

Merits of the cause not in question upon bailing. Post. pl. 9.

(a) When a plaintiff has once sworn positively to his debt, in order to hold the defendant to special bail, the Court of King's Bench will never receive any affidavit whatever either to explain or contradict the plaintiff's oath; even an affidavit of the plaintiff's confession that the defendant owes him nothing will not be received; *Emerson v. Hawkins*, 1 Will. 335. In that case the plaintiff in trover against custom-house officers for goods seized, swore they were indebted, and they were obliged to give special bail, though the goods were in the king's warehouse, and there was a suit in the Exchequer for condemnation. But the practice of the Common Pleas somewhat differs in this particular from the practice of the King's Bench, and admits of supplemental and even contradictory affidavits; for they hold that, notwithstanding the plaintiff makes a positive affidavit of his debt, yet the matter of bail is examinable by the Court. The plaintiff made an affidavit of his debt, in order to hold the defendant to bail; but the defendant making an affidavit that he believed the whole debt would appear to be paid, a common appear-

ance was allowed by the Court. *Barnes* 66. 1 *Crompt.* 44. This difference in the practice of the two Courts is stated by Bull. J. in *Mackenzie v. Mackenzie*, 1 T. R. 716. If a Judge in B. R. makes an order to hold defendant to bail for an assault, imprisonment, and such like action, where the defendant cannot be held to special bail, without an affidavit and order thereupon, no counter-affidavit will be allowed, to lessen the bail ordered by him. 1 *Bl. Rep.* 192. In *Kirk v. Strickland*, B. R. Doug. 449. the plaintiff swore the defendant was indebted unto him in 50 *l.* (which was the penalty of a bond for indemnifying a parish against a bastard). The defendant swore that only 3 *l.* was due. The Court at first seemed to think they could not relieve the defendant upon summary application, it having been an uniform rule not to go into the merits, upon such a motion, but to take the matter as it stood upon the affidavit to hold to bail; but at last they granted the rule, declaring that they were persuaded the plaintiff would not venture to shew cause against it. *Vide* *Sir.* 1233.

8. *Dux Ormond versus Brierly.*

[Trin. 10 Will. 3. B. R.]

Carth. 519.

IN an action upon a replevin bond, common bail shall be filed.

[100]

9. Anonymous.

[Hill. 11 Will. 3. B. R.]

Merits of a cause
not in question
upon bailing.
Ante pl. 7.
Vide Doug. 449.

THE merits of a cause shall not be tried in a motion for bail. In an action of debt upon a bond, the defendant says it was *per duress*, that will not excuse him from special bail, for the Court will not determine the merits upon such a motion, nor put a slur upon the plaintiff's cause, which ought to come down fairly to trial without prejudice; so if he says it was *usurious*. *Per Holt* Chief Justice.

10. Anonymous.

[Hill. 11 Will. 3. B. R.]

Bail in an action
for money won
at play. In an
action by the
loser at gaming,
special bail shall
be given.
2 Stran. 1079.
Andrews 70.
upon the Stat.
9 Ann. cap. 14.

IN an action for money won at play, *Gould and Turton* were for denying special bail; for since the plaintiff played upon tick, they would not help his security, and they were for making it a rule of Court. *Holt* Chief Justice *contra*: That the practice has been otherwise; and the contract if under 100*l.* is lawful, and the plaintiff ventured his money against it. That they could not so far discountenance what the law allowed, and to say they were not to better his security since he played upon tick, would as well prove that there should be no bail in an *indebitatus assumpsit*, &c. The rule for special bail stood.

11. Anonymous.

[Hill. 11 Will. 3. B. R.]

1 Sid. 63. Bail
in debt upon a
bond to perform
covenants. 2 Jo.
97. 1 Lev. 260,
300. 2 Roll. Rep. 53. Noy 8.

IN debt upon a bond to perform covenants, no bail shall be given, but with respect to the breaches and the damage done thereby; but the measure of that shall be taken from the plaintiff's oath (a).

(a) *Vide Barnes* 109.

12. Anonymous.

[Hill. 11 Will. 3. B. R.]

THE RE was a question if bail be put in in one term, and new bail is added the next term after, if this should be a bail as of the first term, or only of the term when added? The clerks differed, but the Court was of opinion, it was only bail of that term when the additional bail was put in; for they said it was not bail till completed and accepted, and making the additional bail to be bail of the first term, might do wrong to a third person, who might be a purchaser after the first, and before the additional bail was put in. *Per Cur'.*

Where additional bail is put in, the whole entry shall be of that term.

13. Anonymous.

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[Hill. 11 Will. 3. B. R.]

UPON *non est inventus* returned on the *capias* against the principal, the bail's recognizance is forfeited in strictness of law; but by the course of the court, if the principal be rendered before the return of *alias scire facias* against the bail, the Court will stay proceedings. But instead of a *scire facias* against bail, the plaintiff brought debt upon the recognizance, and the bail pleaded a render before the return of the *latitat*, i. e. a *latitat* actually sued out and entered. *Et per Cur'.* Though this cannot be pleaded, yet the plaintiff shall not by this new course prevent the grace of the court; we will allow a render in this case of an action of debt, as well as a *scire facias*, and that at any time before the return of the *latitat*, and perhaps may enlarge the time; the Court denied the case in 3 *Keble*, *Miles* and *Bateman*. *Vide Ray*. 14. But in regard there had been pleadings in this case, the defendant was ordered to pay costs (d).

Render before return of the *latitat* not pleadable to an action on a recognizance of bail.

Mod. Cases 132.
2 Roll. Rep.
367. Moor 850.

3 Keb. 707,
734, 739. Cro.
Jac. 109.
2 Brownl. 76.
Cro. El. 738.
2 Dan. 493.
pl. 8.

(a) Bail sued in debt on recognizance in B. R. have eight days after the return of process to surrender defendant; and if there be but four days in the term after the return of the writ, he shall have four days in the term following; *Milner v. Pet*, 1 *Ld. Raym.* 721. *Tr.* 1 *Ann.* In C. B on or before the return of process, *Mic.* 1654, and where the bail moved to stay proceedings against them in an action on the recognizance, the writ not having been served four days before

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the return, the Court on shewing cause made the rule absolute; *Barnes* 62. 1 *Crompt.* 70. If the proceedings be by *sci. fa.* the render may be before or on the appearance-day of the return of the first *sci. fa.* sitting the Court if that be returned *scire feci*; in the case of two *nihils* returned before or on the appearance-day of the second, *Derisly v. Deland*, *Barnes* 82.; but not later, 1 *Roll.* 334. 1 *Crompt.* 70. 2 *Crompt.* 88. Bail in action by original have till the *quarto die post* (*sidente curia*) to surrender

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surrender principal in *B. R.* as in *C. B.*; and subsequent proceedings on *sci. fa.* shall be stayed, *Bailey v. Smeatman*, 4 *Bur.* 2134. If an action on recognizance is brought in *C. B.* against an attorney of *B. R.*, and plaintiff discontinues the action because he had sued the attorney in a wrong court, the attorney surrenders his principal, and then bill is filed in *B. R.*, the render is good, *Hoare v. Mingay*, *Str* 915. In a case in the Exchequer, decided when the editor was present, *E. 22 G. 3.* the plaintiff had sued in the Exchequer the bail in *C. B.* before the end of four days from the return of *ca. sa.*; which would be irregular in *C. B.*, and the principal was surrendered in *C. B.* before the bail by the practice of that court would be liable. It was ruled that the plaintiff could not,

by suing in a different court, alter the responsibility; and the proceedings were set aside with costs. *Thompson*, B. doubted whether the action on a recognizance ought not to be in the same court as the original suit, as in actions on bail bonds. *Larves* for the plaintiff, *Rous* for the bail. If the principal is alive at the return of the *ca. sa.* the bail are not discharged by his dying at any time after. *Cro. Car.* 165. 2 *Ld. Raym.* 1452. 2 *Str.* 717. *Barnes* 106. 2 *Willf.* 67. 2 *Crompt.* 88. If the plaintiff, on the return of *non est invent.* sues the bail and delivers a declaration *de bene esse*, the bail must, in order to stay proceedings, pay costs in that action, as well as debt and costs in the other, which they had tendered within the time allowed to surrender their principal. 5 *T. R.* 363.

14. *Lyell versus Manu capt. Galletly.*

[*Trin.* 12 *Will.* 3. *B. R.*.]

Ante 93, 98.
Cro. El. 618.
1 *Roll. Abr.*
333. 1 *Lill.* 187.
* Ought to give
two days notice.
Far. 98. *Vide*
Mod. Caf. 238.

H. Has a judgment obtained against him, and he renders himself before the return of the *capias*, * but never gives the plaintiff notice of his render, nor gets the bail-piece discharged; the plaintiff proceeds to judgment against the bail upon a *scire facias*; and the Court would not relieve them upon motion, because no *exoneratur* was entered, and a *scire facias* returned; but put them to their *audita querela*.

15. *Lumley versus Quarry.*

[*Pal.* 1 *Ann. B. R.* 2 *Ld. Raym.* 767. *S. C.*]

Far. 9. Upon
removal by ha-
beas corpus, the
Court will exa-
mine into the
cause of action.
Ante 98. 1 *Sid.*
418. *Holt* 88.
S. C. 1 *Lev.*
268. *Vide St.*
19 *G.* 3. c. 70.

AN action was brought against the defendant for a ship and cargo; and the question was, Whether the defendant should be discharged upon common bail? It was alleged for the plaintiff, that the cause came in from *London* by *habeas corpus*, and therefore they ought to have special bail of course. But *Holt* C. J. held, that the Court here could examine into the cause of action upon a *habeas corpus*, and took this diversity, that if the cause of action were such as required bail, though it were under the value of 10 *l.* they would hold the defendant to bail: but if the action was vexatious, or such as required no bail, as an

action against an executor, they would discharge him upon common bail. Upon which it was urged for the defendant, that what he did with relation to this ship and cargo, was as Judge of the Admiralty in the *West Indies*; therefore no reason why he should be held to bail. On the other side it appeared, that the defendant had the ship and cargo in his own custody, which was intermeddling further than the duty of his office warranted; and for this reason he was held to bail; but otherwise not.

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In a like case, viz. an action removed by *habeas corpus*, Mod. Cases 242. Far. 9. Ante 98. the Court held there must be bail here; for else the defendant by his own act puts the plaintiff in a worse condition than he was below; but they could consider the *quantum* of the sum in which the bail ought to be taken, if the action appeared to them to be vexatious. *Mich. 3 Ann. B. R. (a).*

(a) *Vide 2 Bl. Rep. 192.*

16. Genbaldo *versus* Cognoni.

[Mich. 3 Ann. B. R.]

PLAINTIFF brought an action of trespass, assault, and battery by bill of Middlesex, with an *ac etiam* for 40 *l.* and recovered 100 *l.* and the Court held, the bail should not be liable for more than the *ac etiam*; for that is the measure and ground of his undertaking. Then the question arose, Whether he should be liable for 40 *l.*? and Holt Chief Justice held he was not liable at all; for his recognizance is to answer the condemnation; and since that cannot be, he is bound to nothing. And Clark the secondary affirmed, there was a rule of Court, that where the plaintiff recovers a greater sum than is laid in the action, the bail shall not be chargeable *in ista actione*. Another question arose, Whether here was any bail? For there cannot be bail without a writ, and here the writ was returnable of *Michaelmas* term, whereas the bail was of a term precedent: *Et sic pendet (b).*

In B. R. if the sum recovered exceed the sum in the *ac etiam*; the bail is not liable. 6 Mod. 90. 266. S. C. by name of Garibaldo. *vers. Cognoni.* 1 Mod. 8. 2 Keb. 552. 1 Sid. 183. 258. 425. 1 Vent. 44. Holt 89.

(b) In *Martin v. Mone*, 2 Str. 922. it was ruled that the bail should be liable to the amount mentioned in the *ac etiam*, and no more. In *Jackson v. Hassel*, Doug. 330. it was held that they should only be liable to the amount of the debt sworn to, and costs. But the bail to the sheriff are liable to the extent of the penalty in the bail-

bond; *Mitchel v. Gibbons*, H. Bl. 76. The sheriff, on an attachment for not bringing in the body, is liable to the whole debt and costs; *Fowles v. Macintosh*, H. Bl. 233. In assault to damage of 500 *l.* bail bound jointly and severally for 140 *l.* verdict for 300 *l.*; each bail shall pay 140 *l.* *Gen. Dig.* Bail.

Bail in Criminal Cases.

1. Fitz-Patrick's Case.

[Trin. 7 Will. 3. B. R.]

Bail for default
of prosecution.
4 Inst. 71. Mod.
Cases, &c. 97.
Stile 418. Lut.
32.

FITZ-PATRICK was committed to *Newgate* by the Privy Council, for aiding Colonel *Dorrington* to escape out of the *Tower*, where he was committed for high treason; and, being brought here by *habeas corpus*, was bailed; because though the commitment was for high treason, yet there was no prosecution, and a sessions was past.

2. The King *versus* Keat.

[Mich. 8 Will. 3. B. R.]

Convict of man-
slaughter not
bailable before
clergy had.
Ante 61. 4 Inst.
178. 3 Bulst.
114. 1 Roll.
Rep. 268. Cases
B. R. 102. 118.
S. C.

MR. Keat was indicted of murder, and also for stabbing, and the jury found him guilty of manslaughter; and as to the rest found a special verdict; and Sir *Bartholomew Shower* moved he might be bailed; but it was denied, for he is found expressly to be guilty of manslaughter, and in that case bail is never allowed till clergy had.

3. Lisle's Case.

[Mich. 8 Will. 3. B. R.]

Ante 61:

LISLE, who was indicted of murder, and found guilty of manslaughter, was bailed before clergy had. *Vide* Appeal, Case 3.

4. Lord Aylesbury's Case.

[Hill. 8 Will. 3. B. R.]

Snow. 191. H.
ought to enter
his prayer on the
habeas corpus
act, to be tried
the first week of
the term or day

ONE committed for treason or felony ought to enter his prayer the first week of the term or day of the sessions next after his commitment, or he shall not have the benefit of the *habeas corpus* act (a); but if an act of par-

(a) R. 1 Vent. 346. See. 150.

liament

liament be made which takes away the power of bailing for a time, he need not then enter his prayer, for that is thereby dispensed with : but then he ought to enter it the first week of the term or day of the sessions after the expiration of that act of parliament ; and for want thereof, the benefit of the *babeas corpus* act was denied ; but because the defendant had been long in prison, and his trial had been delayed, and affidavit was made that his life was in danger, the Court bailed him.

of sessions after commitment.
Comb. 421. S. C.
Cases B. R. 117.
Holt 84.

[104]

2 Jon. 222.
Sed. 418. Lut.
12. Andrews 65.

5. Lord Mohun's Case.

[Mich. 9 Will. 3. B. R.]

IF a man be found guilty of murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon depositions taken in writing which we may look into. Otherwise, if a man be found guilty of murder by a grand jury ; because the court cannot take notice of their evidence, which they by their oath are bound to conceal. *Et per Cur.* There is no difference between peers and commoners as to bail (a).

H. found guilty of murder by the coroner's inquest, bailable ; otherwise if indicted. 1 Bulst. 85. 3 Bulst. 113. 1 Roll. Rep. 268. 1 Sid. 316. Skin. 683. S. C. Holt 84.

(a) *Rex v. Arton*, 2 Str. 831. The defendant, as keeper of a prison, had been tried, and acquitted on full evidence and to general satisfaction on four indictments for murder charged to be committed by confining prisoners in an improper place. He was committed by a justice of peace to answer

a fifth charge, and moved to be admitted to bail on producing copies of the informations, and affidavits of the former trials, and of the identical nature of the offences ; but the Court refused to look into the informations, or to admit the defendant to bail.

6. Marriot's Case.

[Mich. 9 Will. 3. B. R.]

MARRIOT was committed for forging indorsements upon Exchequer-bills ; and upon a *babeas corpus* was bailed ; because the crime was only a great misdemeanor ; for though the forging the bills be felony, yet forging the indorsement is not. It is felony *per 8 & 9 W. 3. cap. 20.*

Bail in misdemeanor.

7. Anonymous.

[Trin. 11 Will. 3. B. R.]

Post. 176. Toller's case. S. C. One indicted of murder ought not to be bailed upon affidavits of the evidence. 2 Jon. 222. Stil. 116. 1 Bulst. 85. Holt 153.

F. S. being committed upon an indictment for murder, moved to be bailed, and this within less than three weeks of the sessions; *Rokeby* and *Turton* were for bailing him; because the evidence upon the affidavits read, did not seem to them sufficient to prove him guilty. *Holt* C. J. and *Gould contra*. The evidence does affect him, and that is enough. The allowing the favour of bail may discourage the prosecution; therefore it is not fit the Court should declare their opinion of the evidence beforehand; for it must prejudice the prisoner on the one side, or the prosecutor on the other.

[105]

8. *Rex versus Davison*.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 603. S. C.]

H. taken on excommunicato capiendo, bailable while the return of the habeas corpus is under the consideration of the court. 1 Bulst. 122. Far. 16, 59. Post. 294, 134, 672. 1 Cro. 507, 552, 558. Latch. 174. Cro. Jac. 29, 67. 1 Roll. Rep. 132, 384. 1 Sid. 286. 2 Roll. Abr. 113. H. 11 88. S. C.

UPON a *habeas corpus* to bring up the body of one *Davison* a Quaker, the cause returned was a writ of *excommunicato capiendo*, which recited a *significavit* of an excommunication for teaching school without a licence; and the Court doubting whether this was an offence, desired to hear counsel upon it; and then Mr. *Northey* moved he might be bailed in the mean time; and cited several authorities that a man might be bailed, while the legality of the return is under the consideration of the Court. *Vaugh.* 157. *Lat.* 174. 1 *Cro.* 552, 557. And also *Price's case*, *Mich.* 29 *Car.* 2. *B. R.* who was taken upon an *excommunicato capiendo*, and brought up by *habeas corpus* and bailed, while the return was under consideration; and in that case the Court being against *Price* upon the return, his counsel insisted that he could not be committed again, and thought they had got an advantage that way, but notwithstanding that he was recommitted. He cited also *Clerk's case*, who was committed by the vintners company, and bailed by *Holt* C. J. at his chamber. Upon these authorities the defendant was bailed, and the entry was, *traditur in ballium & interim Curia advisare vult*; and the condition of the recognizance was to appear the first day of the term, and from day to day; and if the Court should adjudge the return good, to render his body to prison. The Chief Justice said they bailed men in execution upon an *audita querela*, and by the petition of right must bail or remand men in convenient time. The same rule was made. this term in *Reynold's case*, (who was committed by the Court

Court of Aldermen, for assisting to marry a city-orphan,) while the Court considered the return.

9. Anonymous.

[Trin. 1 Ann. B. R.]

THE defendant in an indictment in *B. R.* being bailed on the indictment, and likewise in a civil action then pending against him in *C. B.* rendered himself in discharge of his bail in the civil action to the *Fleet*, and from thence by *habeas corpus* he moved himself to the *King's Bench* and escaped. His bail to the indictment moved that their recognizance might not be estreated, pretending he was taken out of their custody by his commitment to the marshal; *sed non allocatur*, for they must take care of him there, and they might have had him committed in discharge of them. *Ex motione Broderick and Raymond.*

Render in discharge of bail in an action, will not discharge the bail on an indictment.

10. Dr. Watson's Case.

[106]

[Mich. 1 Ann. B. R.]

DR. Watson, late bishop of *St. David's*, was taken on an *excom. capiendo*, and brought into *B. R.* by *habeas corpus*, and pleaded to the writ, that he was a Lord of Parliament, and moved to be bailed, while the return was under consideration. And Powell said, Though it had been done, it was in their discretion, and was contrary to the statute of *Westminster*; and he did not think it discretion upon such a plea, which every body knew to be false, he being deprived by commissioners of delegates, of which Powell was one on the appeal. Holt C. J. agreed; and that though they could not take judicial notice of the frailty of his plea, yet it should lead their discretion; and he was not bailed.

Bailing during advisement is discretionary, and the court will refuse it if defendant pleads a false plea. *Mod. Cases, &c.* 160. *Post.* 294. *S. C.* 3 D. 293. p. 4. *Far.* 56, 117. *Carth.* 484. 3 *Salk.* 90. 5 *Mod.* 433. *Holt* 632. 2 *Ld. Raym.* 790.

11. Domina Regina versus Layton.

[Pasch. 4 Ann. B. R.]

LAYTON and others were committed by the Lord Mayor of London, upon his view, for a forcible detainer, and fined 100 *l.* and committed in execution, and the record of the conviction was removed by *certiorari*, and the defendant brought a writ of error *coram nobis*, and assigned error in person; and now it was moved, they might

Upon error of a conviction for a forcible detainer, defendant refused to be bailed. 1 *Sid.* 286. 2 *Keb.* 47. The King and Whitmore. *Post.* 353, 450.

be bailed. *Vide* 1 Cro. 557. *Keb.* 43. *Sid.* 320. 2 *Keb.* 173. *Broderick contra* urged, That in error to reverse an outlawry the Court will take bail, but not to reverse a judgment in an indictment: At last the Court refused to bail him, being in execution for a fine, and having committed a very notorious breach of the peace in the heart of the city, though a long vacation was coming on.

Nota, Persons committed for felony are entitled to be bailed after a trial is lost, especially if it be doubtful whether they are guilty. The King against Bell and his wife. *Andrews* 65.

1. Trevilian *versus* Pyne.

In trespass for taking goods or replevin, if the defendant makes consuance, traverse of the command is sufficient; aliter in *clausum fregit*.
9 Co. 33, 34,
&c. *Godb.* 23,
&c. *Keiw.* 31.
Carth. 74. *Rep.*
A. Q. 112. S. C.

Post. 409.

31 H. 6. 3. a.
2 Leon. 196.
215.

REPLEVIN; defendant makes consuance as bailiff to J. S. Plaintiff pleads that he took them *de injuria sua propria, absque hoc*, that he was bailiff to J. S. To this it was demurred: And after argument, the traverse was held to be well taken; and a difference observed between an action of trespass *quare clausum fregit*, and an action of trespass for taking cattle or replevin. In the first case, if the defendant justifies an entry to the close by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff shall not in his replication traverse the command; because it would admit the truth of the rest of the plea, *viz.* That the freehold was in J. S. and not in the plaintiff, which would be sufficient to bar his action, whether the defendant was impowered by J. S. to enter, or not impowered; for it is not material that the defendant has done a wrong to a stranger, if it be none to the plaintiff: But in the other two cases, if the defendant justifies taking my cattle as bailiff to J. S. in whom he lays a title to take them, as for distress, or other cause, there it may be material to traverse the command or authority; for though J. S. had right to take the cattle, yet a stranger, who had no authority from him, will be liable; so that both parts of the defendant's plea in this case must be true, and therefore an answer to any part is sufficient; so in trespass for taking goods. *Aliter* in trespass *quare clausum fregit*. *Vide* 1 Leon. 50. 2 Leon. 169, 216. *Yelv.* 148. 3 Lev. 20. *contra.* 1 Ro. Rep. 46. Cro. El. 14.

2. Matthews *versus* Carew.

[Mich. 1 Ann. B. R.]

TRESPASS for taking his tankard; defendant pleaded, that at a court-leet at *Westminster presentatum fuit*, That the plaintiff in a cellar within the leet did melt tallow, *ad commune nocumentum, &c.* for which he was amerced 5 s. by the jurors, *unde habuit notitiam*, and for that being requested he did not pay, the defendant as bailiff to the Dean and Chapter, * *et per eorum mandat.* discontinued. *Et per Cur.* 1st, It is sufficient to plead *presentatum fuit* without averring in fact that he did melt, &c. for *non refert* as to him whether the offence was done or not, since there was a presentment: And the Court took a difference between a replevin and trespass; in the first, the bailiff is an actor, and is to recover, which shall be upon the merits; but in trespass, as in this case, the bailiff is only to excuse the wrong. *Vide 3 Cro. 885. 27 H. 8.*

8. 3 *Levn.* 14.

But secondly, *This plea is naught, because the defendant justifying as bailiff, ought to have set out some estreat of the Court, or warrant from the steward, and to have justified under that. *Vide Mo. 573, 607, 847. 3 Cro. 698, 748.*

In justification as bailiff to a court-leet, for levying an amercement, some estreat of the court or warrant of the steward must be shewn. Show. 61. 3 Mod. 137. Carth. 73. Skin. 587.

* [108]
1 Lill. 159.

Post. 407. Shower's Rep. 61, 62. 1 Dan. 685. pl. 1. Hob. 129. 3 Lev. 19.

Bankrupts. *Vi. St. 5 G. 2. c. 30.*

1. Cary *versus* Crisp.

[Pas. 1 Will. & Mar. B. R.]

IN an *indebitatus assumpsit*; the defendant pleaded that the plaintiff became bankrupt, and commission was taken out, and so all his goods, &c. belonged to the commissioners, &c. The plaintiff demurred and had judgment; for till an assignment the property of the goods is not transferred out of the bankrupt (a). *Vide statute 1 Jac. 1. c. 15. § 13.*

Property not transferred out of the bankrupt till assignment. Post. 111. Vide 1 Lill. 400. 1 Burrow 31, 32.

(a) *D. ac. Str.* 981.

2. Paine & al. *versus* Teap & al.

[Hill. 2 W. & M. C. B.]

Outlawry of the bankrupt after an act of bankruptcy committed, cannot defeat the interest the creditors have acquired in his estate. 1 Lev. 8. 1 Vent. 193. 2 Lev. 50.

[109]

UPON an *English* bill in the Exchequer the Barons prayed the opinion of the Judges of C. B. The case was, *H.* becomes bankrupt, and long after was outlawed. The king made a lease of the profits of his lands, and also a grant of his chattels: Afterwards a commission of bankruptcy was taken out; and the question was, Whether or how far this outlawry, lease, and grant should prejudice the creditors of the bankrupt?

And first, it was taken for certain, That where a person is indebted to the king, and also to a subject, the king shall have preference in payment. 2dly, That no subsequent act of the bankrupt can defeat the interest his creditors have by his bankruptcy in his estate. 3dly, That the king hath by common law such a power to require his subjects to answer all demands of law and justice, that not appearing upon process is such a contempt of law, that the person guilty is put out of the law, forfeits his goods and chattels, 11 *H. 6.* 17. his leases for years, 9 *H. 6.* 21. and his trust in such leases, 2 *Ro.* 807. *Hob.* 214. and the profits of his lands of freehold, 9 *H. 6.* 20. 21 *H. 7.* 7.

Resolved therefore, 1st, That the creditors are not hurt by the outlawry; for that was his own act and by his own default, and the voluntary permitting himself to be outlawed, shall not prejudice them, 2 *Sid.* 115. 2dly, That the assignee of the king's lease having paid 37 *l.* for it, is a purchaser within the 21 *Jac.* 1. c. 19. not to be impeached by the commission sued out five years after the bankruptcy.

1 Vent. 193.
2 Lev. 49.
1 Jones 203.
2 Sid. 176.
1 Lev. 33.
2 Lev. 49.

3. Cane *versus* Coleman.

[Trin. 2 W. & M. in Cam. Scacc. Intr. in B. R. Mich. 1 Jac. 2. Rot. 166]

Lying in prison upon arrest is an act of bankruptcy. Otherwise if he put in bail. Viceinfra, pl. contra. 1 Lill. 202. Raym. 479. 3 Lev. 58. 1 Vent. 370. 371. 1 Burrow 439. Far. 130. Skin. 270. 2 T. R. 141.

INDEBITATUS, for money had and received to his use; on a special verdict the case was, *H.* being a silk-man owed *B.* 100 *l.* and to *C.* 50 *l.*; *B.* arrests him for the 100 *l.* in the sheriff's court, and had bail. After that, viz. within a month, *H.* pays off *C.* and after that rendered himself in discharge of his bail in *B.*'s action. And note, 21 *Jac.* 1. c. 19. says, *He shall be a bankrupt from the time of the first arrest. Et per Cur.* That is and must be taken from the time of the first arrest, upon which he lies in prison, not where he puts in sufficient bail, for that might be infinitely prejudicial and mischievous, and no man

man could ever safely pay or receive from a tradesman. Adjudged in *B. R.* and affirmed in error in *Com. Scacc.* (a).

(a) This point is recognized in *Cooke's Bank. Law*, cont. to *Smith and Stracy*, *post*.

4. Newton *versus* Trigg.

[*Trin.* 3 *W. & M. B. R.* *Intr. Mich.* 1 *Jac.* 2. *Rot.* 226.]

AN innkeeper being also part-owner of a ship, and having 51 *l.* stock in the ship, absconded: *Eyre* Justice held, as to the share of the ship that was nothing; for that it is not a stock *in potentia* to trade with, that will make a bankrupt; but there must be a trading therewith *in facto*. And he held that an innkeeper could not be a bankrupt, for he is not like a trader; he must receive all comers, and feed them and lodge them, taking a reasonable rate; which if he do not, he is indictable. *Holt* C. J. concurred, and that he is not taken notice * of in law, as a trader, but as an host, *hospitator*; and he is paid not merely for his provisions, but also for his care, pains, protection, and security; and he buys meat and drink, not for sale or trading, but for accommodation. And an innkeeper cannot make a contract *ad libitum*; nor does he buy or sell at large, but to guest only. And the Chief Justice held, that wherever a man buys and sells under a particular restraint and limitation, he is not a seller within the statute, as a commissioner of the navy, and so of a farmer. *Vide Shower's Reports*, 3 *Mod.* 326.

Show. 96, S. C. 268. 3 *Lev.* 309. *Comb.* 181. Innkeeper not within the statutes about bankrupts. *Carth.* 149. 1 *Sid.* 411. 2 *Roll. Abr.* 84. 1 *Ld. Raym.* 287. *Cro. Jac.* 585. *Cro. Car.* 31, 549. *Dyer* 158. b. 2 *Cro* 609. 3 *Mod.* 326, 329.

* [110]
Buying and selling under a particular restraint is not within the statute.

* *Vide Byscall v. Hogg*, 3 *Wilson* 146. *Patman v. Vaughan*, 1 *T. R.* 572. *Cooke's Bankrupt Law* 69, 70 In the last case it was established that

an innkeeper selling liquors out of the house to any person who applies, for the sake of profit, is a trader within the bankrupt law.

5. Bird *versus* Sedgwick.

[*Paf.* 5 *W. & M. B. R.*]

A Gentleman of the *Temple* went from hence to *Lisbon*, where he turned factor, and traded to *England*, and broke. *Blenco* argued that the statutes about bankrupts do not extend to persons out of the realm: the subject of them is cases of arrests, outlawries, and departing out of the realm; and the 21 *Jac.* 1. which extends to aliens, is only aliens resident here; yet the Court held him a bankrupt, by reason of his trading hither and back again, which

An English subject trading from foreign parts, hither, may be a bankrupt. *Raym.* 375. 2 *Jon.* 141. 2 *Vern.* 162.

which gained him a credit here. *Per Cur.* on a trial at bar (a).

(a) The following cases, which are collected in Mr. Cooke's Bankrupt Law, 85 to 90, contain the whole doctrine upon this subject.—*Dodsworth v. Anderson*, Raym. 375. 2 Jon. 141. 2 Vern. 162.—A. who lived in Ireland, but often came to England and bought goods; which he sold in Ireland, and at one time sold goods in England, and at another in Ireland to be delivered in England, was held a trader within the bankrupt laws. *Ex parte Smith* before Lord Hardwicke cited Cowp. 402.—A person who went from England to Barbadoes, where he was a factor and planter, and traded to England by sending goods from his plantations, and receiving goods back again bought in England; and disposed of goods in Barbadoes for merchants in England as a factor; was held subject to the bankrupt laws. *Ex parte*

Williamson, 1 Atk. 82. Lord Hardwicke said, If a person carries on a trade in one kingdom belonging to the crown of Great Britain, and comes over to another, a commission may be taken out where he happens to be. *Alexander v. Vaughan*, Cowp. 398.—A native of Scotland trading and residing there, came to England, and being there occasionally, was arrested, and lay in prison two months, and was ruled to be within the bankrupt laws.—Mr. Cooke from these cases makes the following deduction:—Any person trading to England, whether native, denizen, or alien, though never resident as a trader in England, may be a bankrupt if he occasionally comes to this country, and commits an act of bankruptcy. The statutes are, as to the act of bankruptcy, confined to England. Cooke 91, 3d edit.

6. Hopkins *versus* Ellis.

[Trin. 3 Ann. coram Holt C. J. At nisi prius at Guildhall.]

Plain act of bankruptcy cannot be purged by dealing afterwards. Otherwise if doubtful only. 1 Lev. 13, 14, 17. 2 Show. 253, 512. Far. 139. Holt 95. S. C.

UPON an issue directed out of Chancery, Whether bankrupt or not at such a time, it was held *per Holt* Chief Justice, That if H. commits a plain act of bankruptcy, as keeping house, &c. though he after goes abroad and is a great dealer, yet that will not purge the first act of bankruptcy, but he will still remain a bankrupt; but if the act was not plain but doubtful, then going abroad and dealing, &c. will be an evidence to explain the intent of the first act; for if it was not done to defraud creditors, and keep out of the way, it will not be an act of bankruptcy within the statute: Also, if after a plain act of bankruptcy he pays off or compounds with all his creditors, he is become a new man (b).

(b) In *Colkett v. Freeman*, 2 T. R. 59, it was ruled that a trader who denied himself to the holder of a bill of exchange before nine o'clock in the morning, but afterwards appeared in public during the course of the day, and paid the bill before five in the

evening, had committed an act of bankruptcy, which the subsequent payment could not defeat—the denial being with an intent to delay; although by the practice of merchants in the place (London) the payer of the bill has the whole of the day on which it becomes

becomes due to pay it in. *Buller J.* observed, that the term of "purging an act of bankruptcy" is frequently perverted, and has often been complained of by Lord *Mansfield*, who has on several occasions taken the opportunity of declaring, that it can only mean, that if the act done be in itself

equivocal, other circumstances may be called in to explain it; but if the act be a clear, unequivocal act of bankruptcy, it cannot be purged or explained away by subsequent circumstances. *Vide Worsley v. Demattos*, 1 *Bur.* 484.

7. Smith *versus* Stracy.

[*Trin.* 2 *Ann.* *coram* *Holt C. J.* *At nisi prius at Guildhall.*]

IN *trover* the case was; *J. S.* was arrested at the suit of *H.* and put in bail: afterwards upon a *scire facias* at another's suit, his goods were sold to the plaintiff; after this *J. S.* renders * himself in discharge of his bail, and goes to prison. And *Holt C. J.* inclined, (contrary to the case of *Duncomb* and *Walter* in 3 *Lev.* 57. wherein he was of counsel, but not satisfied with the judgment,) That *J. S.* was a bankrupt from the time of the arrest, not from the render only; for if *H.* is arrested at the suit of *A.* and puts in bail, and that pending, is after arrested at the suit of *B.* and goes to prison and lies two months, he is by the act of parliament bankrupt from the time of the first arrest by *A.* But it appearing in this case that the commission was taken out before the two months were expired from the render, it was held to be ill taken out, *J. S.* not being then a bankrupt. And thereupon the plaintiff had a verdict.

If defendant renders in discharge of his bail, and lies two months, he is a bankrupt from the arrest. *Q. & vide supra*, pl. 3. 1 *Lev.* 17. 1 *Mod.* 45. 2 *Show.* 203. 138. 1 *Vent.* 370. 1 *Dan.* 688. pl. 1. 2 *T. R.* 141.

* [111]

8. Kiggil *versus* Player.

[*Pal.* 7 *Ann.* *B. R.*]

ASSIGNEE of commissioners of bankruptcy brought *trover* on their own possession, *ut de bonis suis propriis*; and that they came to the hands of the defendant, and he converted them. And upon evidence it appeared the conversion was by executing a *feri facias* on the goods in the declaration, after the bankruptcy, and before the assignment, and it was not proved that the plaintiff had demanded them; and this being made a case, it was argued, That by assignment the assignee had a property by relation from the very time of the bankruptcy, and there was no mesne interval of time; as where one takes out letters of administration, he has a property from the death of the intestate, and may declare generally *ut de bonis suis propriis*, even before an administration sued out. But *Holt* denied this,

Assignee has the property by relation from the time of the bankruptcy, so as to avoid all mesne acts, but must declare specially. *Vide* 2 *Ro.* 554. 3 *Lev.* 57, 58, 69, 191. *Raym.* 479. 2 *Sid.* 272. *Sho.* 12, 206. *Ante* 103.

this, and said, he ought to declare specially, and so the plaintiff might have done in the principal case, and he relied upon the case of *Perry and Bowyer*; and said the assignee was in by relation from the time of bankruptcy, so as to avoid all mesne acts, but not so as to be actually invested with the very property. *Adjournatur* (a).

(a) In the case of *Cooper* and another, assignees of *Johns v. Chitty* and *Blakiston*, sheriff of London, 1 Bur. 20. 1 Bl. 65. 'an act of bankruptcy was committed on the fourth of December. A judgment was obtained against the bankrupt, execution taken out upon it, and goods seized by the defendants on the fifth. A commission issued, and the commissioners executed an assignment on the eighth. A bill of sale was made by the defendant on the twenty-eighth, and trover was adjudged to be maintainable. [Lord Mansfield explained the general nature of trover, and his observations will be found in a note to that title in 3 Salk.] The sale in that case being subsequent to the commission, constituted part of the argument; but it appears to be the opinion of the Court, that trover was maintainable independent of that circumstance. Accordingly it has been ruled in *Smith v. Milles*, 1 T. R. 475. *Ward v. Macaulay*, 4 T. R. 489. that the sheriff who executes a *feri facias* upon the bankrupt's goods, after an act of bankruptcy committed, and before the issuing of the commission, is not a trespasser, but the assignees may maintain trover against him. In *Russ v. Baker*, 2 Str. 996. it was held that the action may be maintained against the plaintiff who sued out the execution, as well as against the sheriff, if he can be proved a party to the conversion by giving bond to secure the sheriff. Where money has been received by the disposal of goods of a bankrupt, the assignees have their election to bring either trover or assumpsit, but they cannot bring both; and having brought one, and proceeded to judgment in that, it will bar the other. 2 Bl. 830. 3 Wils. 304. In the case of *King*, assignee of *Langman*, v. *Leith*, 2 Term. Rep. 141. where the person being arrested, the defendant, before he had lain two months in pri-

son, sold his goods and paid him the money; and afterwards the two months expired, whereby he became a bankrupt. It was ruled that the bankruptcy related to the first arrest, so as to invalidate the sale and payment, and that the assignees had their election to bring assumpsit (which they had) or trover. The assignees, standing in the place of the bankrupt, must take his property, subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. *Lampriere v. Pasley*, 2 T. R. 485.

The courts will not assist the relation to the act of bankruptcy by motion, because it is odious and *strictissimi juris*, *Clark v. Royal*, 1 Bl. 642.—Vide the observations of Lord Hardwicke concerning this relation, *Billon v. Hyde*, 1 Ves. 328. It is enacted by stat. 19 G. 2. 32. § 1. "that no *bonâ fide* creditor of a bankrupt, in respect of goods really and *bonâ fide* sold to such bankrupt, or in respect to any bill of exchange drawn in the usual and ordinary course of trade and dealing, shall be liable to refund money really and *bonâ fide* received in the usual course of trade, before any commission or notice of the bankruptcy or insolvency." The words of this provision have been strictly adhered to, therefore in *Vernon v. Hall*, 2 T. R. 640. where a bill of exchange was drawn on A. payable the 7th of Feb.; and the holder gave A. time to pay the money upon an agreement to allow interest. A. committed an act of bankruptcy the 2d of May; on the 22d of May the money was paid to the defendant, not knowing of the act of bankruptcy, and he was compelled to refund, this not being a payment in the usual course of trade. In *Deas v. Freeman*, 5 T. R. 197. the defendant was held liable to refund money paid him for the carriage of goods after the act of bankruptcy.

*Resolutions of the Judges upon the Statute 4 & 5 Ann.
c. 17. (a) in Serjeants Inn in Chancery-Lane,
Dec. 3, 1706.*

1st, **T**HAT the first clause of the act extends only to such as shall first become bankrupts after the 24th day of *June* 1706, who are understood to be those against whom no commission of bankruptcy was sued out before that time. And if the certificate of the commissioners do not mention the party to have first become a bankrupt after that time, it ought to be disallowed for that cause : but it is however thought fit and agreed, that, before the certificate be disallowed, some proof be made by the creditors of the party's being a bankrupt before that time.

Resolutions of the judges upon the statute 4 & 5 Ann. against frauds committed by bankrupts.

[112]

2dly, That there ought to be a certificate of the allowance or disallowance made upon the reference, and that remitted to the Lord Keeper.

3dly, That the act having impowered the Judges to determine *prout*, &c. there is by implication a power given them to examine witnesses *viva voce*, and that the said method be taken where witnesses are to be had ; but where there are no witnesses, that the copies of affidavits filed in Chancery, and sworn before a master extraordinary, be received and read ; and that affidavits taken before the judges, to whom the matter is referred, may be read.

4thly, That the judges make out summons for witnesses.

5thly, That the second clause in the act extends to those that were bankrupts before the 10th of *March* 1705, against whom there were commissions then sued out and subsisting : If the matters were determined and commission closed, or if superseded or repealed, or commissioners all dead, unless the same were renewed or revived, or *procedentes* in reasonable time, *viz.* within half a year at least, then not within this clause, and the certificate to be disallowed.

(a) This act is expired.

Bargain and Sale of Goods.

1. Callonel *versus* Briggs.

[Trin. 2 Ann. *coram* Holt C. J. *At nisi prius at Guildhall.*]

Hob. 88. Holt
663. S. C.
Poph. 198.
Where one thing
is to be the con-
sideration of the
other, though
there be mutual
promises, per-
formance must
be averred and
proved. Post
171, 172.
Raym. 188.
Sid. 423.
1 Vent. 147.
Lev. 274. Mod.
Cases, &c. 42.
1 Saund. 319,
20. 2 Saund.
351.

* [113]

AN agreement was, that the defendant should pay so much money six months after the bargain, the plaintiff transferring stock. The plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying, &c. *Et per Holt C. J.* If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender; for transferring in the first bargain was a condition precedent; and * though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred, unless a certain day be appointed for performance: 1 *Saund.* 319. If I sell you my horse for 10 *l.* if you will have the horse I must have the money; or, if I will have the money, you must have the horse; therefore he obliged the plaintiff either to prove a transfer, or a tender and refusal within the six months (a).

(a) *Vi. acc. Str.* 571. 2 *Bur.* 899. 7 *Co.* 20. b. Note to *Thorpe v. Thorpe*, post 171.

2. Langfort *versus* Administratrix of Tiler.

[Pal. 3 Ann. *coram* Holt C. J. *At nisi prius at Guildhall.*]

Earnest only
binds the bar-
gain, and on de-
fault in the ven-
dee, vendor may
sell to another.
Post 116, 118.
Mod. Cases 147.
1 Keb. 337.
Allen 61.
1 Mod. 9, 124.
1 Sid. 109, 425.
1 Vent. 42.
2 Vent. 155.
S. C. 6 Mod.

THE defendant, who was administratrix to her late husband, used to deal in tea in his lifetime, and bought four tubs of the plaintiff at so much *per* tub, one of which she paid for and took away, leaving 50 *l.* in earnest for the other three; and *Holt* Chief Justice ruled, 1st, That the husband was liable upon the wife's contract, because they cohabited. 2dly, That notwithstanding the earnest, the money must be paid upon fetching away the goods, because no other time for payment is appointed. 3dly, That earnest only binds the bargain, and gives the party a right to demand; but then a demand without the

the payment of the money is void. 4thly, That after earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person.

162, 329. Holt 96. 1 Sid. 128. VI. Com. Dig. 1 vol. 3 edit. p. 413. Agreement B. 3.

Baron and Feme.

[114]

1. Nelthrop & Ux. *versus* Anderfon.

[Mich. 4 W. & M. B. R.]

TROVER by baron and feme, and the plaintiffs declare *quod cum possessionat. fuerant, &c.* the defendant converted *ad dampnum ipsorum*; held naught after verdict; for the possession of the wife is the possession of her husband, and so is the property; so that the conversion cannot be to the damage of the wife but of the husband only.

1 Sid. 172. Trover by baron and feme ad dampnum of both, naught after verdict. Mod. Cases, &c. 341. 2 Cro. 77. 2 Ld. Raym. 1209. 1 Stran. 61. Cro. Jac. 661.

N. B. So in trespass for taking goods. *Far.* 105. But if the trover was before [intermarriage], the conversion after, they may, or may not join. 1 *Vent.* 260. 1 *Sid.* 172 (a).

(a) Baron and feme may not join in replevin, except of goods of the feme taken *dum sola*. *Br. Baron and Feme*, pl. 85. In trover for deed granting a rent-charge to the wife, they may join, *Noy.* 70. *Ruffel and Wife's case*. Judgment in trespass by baron and feme for taking their goods reversed, because the wife ought not to join. *Wittingham v. Broderick*, 7 *Mod.* 105. In replevin by baron and feme for taking their goods, after avowry for rent, *non demisit* pleaded in bar to the avowry, and verdict for plaintiffs; it was excepted in arrest of judgment that they could not join. Lord *Hurdwicke* said, the exception

stands on this foundation, that husband and wife cannot have a joint property in chattels, and in general that is true, because marriage is a gift of all the chattels to the husband; but in this case it does not appear the taking was during the coverture, nor can we presume it was; and the plaintiffs, for ought that appears, might be jointly possessed of these goods before marriage; and if that was the case, and they were taken before marriage, they might after coverture join in the replevin, and declare for taking the goods of husband and wife; and if there can be such case, we must take it to be so here, because the avowry

avowry allows a property in them both. *Burn and Wife v. Maitaire*, B. R. H. 119. Where the action is for goods which the wife has as executrix, she must be joined. *Wentw. Ex.* 207.

In *Siralley against Kerfoot et Ux.* 2 Str. 1064. *Andr.* 242. the action was brought for entering the plaintiff's

house, taking his goods, and converting them to *their* use. It was urged in arrest of judgment, on the authority of *Nelbery v. Anderson*, that the conversion could not be to the use of both. But it was held that that part of the declaration did not vitiate the remainder, which stated a good cause of action.

2. Buckley *versus* Collier.

[Mich. 4 W. & M. B. R. Rot. 20.]

4 Mod. 156.
Baron must
bring action
alone for work
done by the wife
during the co-
verture, unless
there be an ex-
press promise to
the wife. Mod.
Cases, &c. 341.
Danv. 1 Part
712. pl. 7.
Carth. 251.
S. C. 3 Salk.
63. 2 Willon
214, 415, &c.
Vi. 2 Bl. Rep.
1256. Cro. Jac.
205.

BARON and feme declared, That the defendant being indebted to them for work done by the wife, in making him a peruke, he promised to pay, and had not paid, *ad dampn. ipsorum*, &c. To this there was a frivolous plea, and upon that a demurrer. The plaintiff cited 3 Cro. 205. 3 Cro. 61, 96. 1 Cro. 438. but relied principally upon *Burchet's* case. *Per Cur.* *Burchet's* case differs: there was an express promise to the wife, and to that the husband assented by bringing an action thereupon: but here is no express promise laid to the wife; here is nothing but the promise in law, and that must be to the husband, who must have the fruits of his wife's labour, for which he may bring a *quantum meruit*. Also the advantage of the wife's work shall not survive to the wife, but goes to the executors of the husband; for if the wife dies, her debts fall upon the husband; and therefore so shall the profits of her trade to the husband's executors. But this must be intended of work done during the coverture, and not after. Judgment *pro def. (a)*.

(a) The husband and wife may join, on a promise to the wife to pay her 10*l.* if she performed a cure; *Brasford v. Buckingham*, Cro. Jac. 77, 205. On a promise to the wife in consideration of 10*l.* paid by her to marry her daughter; *Pratt v. Taylor*, Cro. Eliz. 61. On a promise in consideration of a marriage had at the defendant's request, to pay the wife 8*l.* *per annum* during coverture; *Hilliard v. Hambridge*, Allen 36. Style 9. On a promise in consideration of boarding defendant's daughter, her being taught needle-work by the wife, and bond entered into by the husband to A. to give them so much; *Fountain v. Smith*, 2 Sid. 148.—They may join in cove-

nant in a lease to them; *Bulst.* 21. *Anon. Br. Baron and Feme*, pl. 23, 47. E. 3. 12. Or against a lessee when the reversion was granted to husband and wife; *Dist. per Cur. Brett v. Cumberland*, Cro. Jac. 399. 3 *Bulst.* 164. 1 *Roll.* 359. (The decision in that case was, that the husband might sue alone.) R. that husband and wife and a third person may join in covenant on lease of land whereof the wife and the third person are tenants in common; *Alebury v. Whalley*, 1 Str. 229. They may join, or the husband may sue alone, on a bond to the wife after coverture; *Lit* 13. 2 *Mod.* 217. *Vi. Ankerstein v. Clarke*, 4 T. R. 616. They may join in an action of debt, on the escape

escape of a person committed by the Court of *Chancery* for non-performance of a decree to pay money to the husband, in a suit instituted by the wife before marriage, and revived after; *Huggins v. Duckham* and wife, in error, 2 *Str.* 726. They must join in an action on an agreement to grind defendant's corn at the wife's mill; *Dunstan v. Burwell*, 1 *Wils.* 224. The dippers at *Tunbridge Wells*, and their husbands, must join in an action for

disturbing them in the employment confirmed to them by statute; *Weller v. Baker*, 2 *Wils.* 414.—They cannot join in an action for money lent by the wife with the husband's consent; *King v. Basingham*, 8 *Mod.* 199. *Vi. Bidgood v. Way*, 2 *Bl. Rep.* 1236. Nor for a legacy left to the wife on an express promise to pay, and on counts for money had and received, paid and expended, and an account stated; *Rose v. Bowler*, *Hen. Bl.* 108.

3. Carpenter *versus* Faulstich.

[Hill. 7 Will. 3. B. R.]

ACTION was brought against baron and feme for a battery done by the wife; the husband was a prisoner in the *King's Bench* before the action brought, and the plaintiff delivered a declaration to the turnkey of the prison against husband * and wife for this battery; and upon rules given to plead, judgment was entered by *nil dicit* against both, and the wife taken in execution. Sir *Bartholomew Shower* moved that this was irregular; for upon delivery of the declaration, the husband should have filed common bail for him and his wife; or should have made an attorney for him and his wife, who should have appeared for them. *Et per Holt C. J.* The plaintiff ought to have sued out process against the husband and wife, and the sheriff should have returned a *non est inventus* for the husband, and a *cepi corpus* for the wife; and then upon common bail filed for her, there might be judgment against both. It was objected, if there be process against baron and feme, and *non est inventus* for the baron, and a *cepi* as to the feme, she shall be discharged. *Vide* 2 *Cro.* 445. To which *Holt* answered, No; she shall not be discharged but upon common bail, and then new process shall go against the baron with an *idem dies* given to the wife. *Vide* 1 *Mod.* 8. *accord.* And because no bail was entered for the wife, the judgment was set aside. *Postea Hill.* 8 *W. B. R.* In another case *Holt C. J.* held, If an action be brought against husband and wife, and the husband is arrested, he shall give a bail-bond for the appearance of him and his wife, and must put in bail for both; but if one bring an action against the husband only, he cannot declare against husband and wife (a).

If H. be in custody, a declaration cannot be delivered against him and his wife, but process must be sued out, and wife arrested. S. C. Comb. 355. Holt 100.

* [115]

2 *Keb.* 355.
Far. 10. 1 *Sid.*
 20, 395. 1 *Mod.*
 8, 135. In actions against baron and feme, baron shall give a bail-bond, or file bail for both.
 1 *Lev.* 1, 51.
 1 *Keb.* 189,
 198, 637. 1 *Sid.*
 29. 6 *Mod.* 17.
 2 *Keb.* 442.

(a) *Non inventus* being returned as to the husband, and the wife being arrested, she was discharged. *Edwards*

v. Reare et ux. 1 *T. R.* 486. (The report does not say upon common bail.) Husband and wife both arrested

ed for the debt of the wife *dum sola*, and the wife discharged, *Harrison v. Bearcliffe et ux.* 2 Str. 1272. Husband and wife, after interlocutory judgment, and *sci. fa.* issued against the bail, were before execution surrendered in discharge of their bail; wife discharged on common bail; *Roberts v. Andrews et ux.* 2 Bl. Rep. 720. After judgment for the battery of the wife, she only was taken in execution, but there was an affidavit of ineffectually endeavouring to take the husband, and the Court refused to discharge her; *Finch v. Duddin et ux.* Str. 1237. Husband and wife both taken in execution for the battery of

the wife, and a motion to discharge her was denied; *Langstaff v. Rain et ux.* 1 Will. 149. Where an action was against a woman as sole, and she makes an affidavit of coverture, she will not thereupon be discharged, unless it was evident and notorious; *Pearson v. Meadon*, 2 Bl. Rep. 503. Where a woman obtains credit under pretence of being sole, the Court will not discharge her in a summary way on affidavit of coverture, but leave her to plead it; *Partridge v. Clark*, 5 T. R. 194. *Vide* 1 T. R. 486. Husband may appear alone to an action brought against him and his wife; *Clark v. Norris et ux.* 11 Bl. 235.

4. Chamberlain *versus* Hewson.

[Hill. 7 Will. 3. B. R. 1 Ld. Raym. 73. S. C. 12 Mod. 244]

5 Mod. 69.
Husband may
release costs ad-
judged to the
wife in the Spi-
ritual Court, un-
less there be a
separation and
alimony allowed.
2 Roll. Abr.
402. pl. 3.
Moor 665, 683.
pl. 492. 1 Roll.
Rep. 426.
3 Bulst. 264.
Noy 45. Cro. El.
908. 2 Roll.
Abr. 293. pl.
300. pl. 10.
Cases B. R. 89.
S. C. Holt 95.
Cro. Car. 222.
5 Mod. 71.

MRS. *Hewson*, the wife of Colonel *Hewson*, sued Mrs. *Chamberlain* in the Spiritual Court for adultery with her husband, and obtained a sentence against her, and costs; Colonel *Hewson* released these costs to Mrs. *Chamberlain*, notwithstanding which, Mrs. *Hewson* prosecuted her in Court Christian for the costs; upon which it was moved here for a prohibition. And it was urged *contra*, That the principal matter was of ecclesiastical cognizance, and that they ought not to be hindered to determine a matter which is incident and necessary. *Et per. Holt C. J.* If a feme covert sue another in the Spiritual Court for incontinence with her husband, and recover 10*l.* costs, and the husband release them, she is by this barred: So it is if husband and wife be divorced *a mensa & thoro*, and a legacy is left to the wife, and the husband release it, she is thereby barred; for the marriage continues, and the husband hath all her right; but if the husband and wife be divorced *a mensa & thoro*, and the wife has her alimony, and sues for defamation or other injury, and there has costs, and the husband releases them, this shall not bar the wife, for these costs come in lieu of what he hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband.

5. *Deerly versus* The Ducheſs of Mazarine.

[Hill. 8 Will. 3. B. R.]

ASSUMPSIT for wages and money lent; on *non assumpsit* the defendant proved ſhe was married, and her husband alive in *France*. The jury found for the plaintiff; upon which, as a verdict againſt evidence, ſhe moved for a new trial, but it was denied; for it ſhall be intended ſhe was divorced: Beſides, the husband is an alien enemy, and in that caſe why is not his wife chargeable as a *feme ſole*, as much as if he had abjured or been baniſhed: Which was the caſe of the Lady *Belknap* and *Weyland*. Co. Lit. 132. b. 133. a. (a).

Divorce intended. Comb. 402. Poſt 646. 1 Ld. Raym. 147. S. C.

(a) In *Sparrow v. Caruthers*, 2 Bl. Rep. 1197. *Yates* J. ruled at *Carliſſe* aſſizes, that the wife of a man transported is liable to be ſued alone. —In a caſe before Lord *Mansfield* at *Maidſtone*, the ſame was alſo ruled; *Cocke's Bankrupt Law*, 43. It alſo appears in ſeveral inſtances, cited Co. Lit. 132. b. 133. a. and by the caſe of the *Counteſs of Portland v. Podgers*, 2 Vern. 104. that where the husband was baniſhed, or had abjured the realm, it ſhould be conſidered as a civil death, and the wife ſhould in all reſpects be regarded as a *feme ſole*.

In the following caſes the doctrine of a *feme covert* being ſuable as a *feme ſole* has been carried conſiderably further; *Ringslead v. Lanſborough*, *Cocke's Bankrupt Law*, 32. 'To an action of *assumpsit* the defendant pleaded, that, at the time of the promiſe, ſhe was wife of Lord *Lanſborough*, ſince deceased; and a replication, "that the defendant lived ſeparate from her husband, they being parted before the promiſe made, and that ſhe, by a deed of ſeparation, had a large ſeparate allowance which was duly paid, and that the defendant lived in *England* and her husband in *Ireland*," was on demurrer held good. A ſeparate maintenance muſt be reſerved to the wife by deed, in order to make her liable to her own debts. *Eſpin. Evid. N. Pr. Eaſter Term*, 34 Geo. 3. *Stridman v. Goſch*. *Barwell v. Brookes*, *Cocke's Bankrupt Law*, 36.

Replication, "that the defendant lived ſeparate and apart from her husband, and had a competent ſeparate maintenance regularly paid, and that the goods were furniſhed for her ſeparate uſe and ſupport," good on demurrer. In Lady *Lanſborough's* caſe ſome ſtreſs had been laid on the husband's living in *Ireland*; the want of which circumſtance was urged as a diſtinction in *Barwell and Brookes*, *Carlſett v. Poelnitz* and *Ann* his wife, 1 T. R. 5. The defendant *Ann* was the wife of Lord *Percy*, and ſeparated with a large allowance. While ſhe lived ſeparate, and the allowance was duly paid, ſhe prevailed upon the plaintiff to join her as ſurety in a bond and warrant of attorney for payment of an annuity to *A. B.*, and promiſed to indemnify him. Afterwards her marriage with Lord *Percy* was diſſolved, but her allowance continued by act of parliament. Afterwards ſhe married the defendant *Poelnitz*; and after that the plaintiff was obliged to pay *A. B.* 202 l. for arrears of the annuity, and 5 l. for coſts, whereupon he brought this action upon the promiſe of indemnity, ſtating all the above facts in the declaration, which, on motion in arreſt of judgment, was held good. Mr *Powell*, in his *Treatiſe on Contracts*, 89, very forcibly combats the laſt-mentioned deciſion; and, although the doctrine ſeems ſettled, his obſervations appear to be very well entitled to attention. In *Gilchriſt v. Brown*, 4 T. R. 760.

replication,

replication, stating that the defendant had committed an act of adultery, and separated from her husband, and lived in adultery, and, whilst so living, promised, &c. was held insufficient, as it did not allege a separate allowance. *Vide also Halebutt v. Baddeley*, 2 Bl. Rep. 1079.

In *Thompson v. Harvey*, 4 Bur. 2177. the circumstance of the wife having a pension from the crown during pleasure, determinable at the will of the Crown, granted to her in her own name, but not by any agreement or otherwise appropriated to her own use, — was held not to exempt the husband

from answering for necessaries supplied for her. Consequently it may be inferred, that such a provision would not, in case of separation, be sufficient to charge the wife.

In *ex parte Preston, Green's Bankrupt Law*, 8. Cooke 30. a woman whose husband, upon an agreement of separation, assigned to trustees his stock in trade to be at her disposal, with which she carried on her own account, the separation having taken place, and the husband having gone to the *East Indies*, was adjudged to be subject to the bankrupt laws.

6. Todd *versus* Stoakes.

[Mich. 8 W. 3. *coram* Holt C. J. *At nisi prius at Guildhall.*
1 Ld. Raym. 444. S. C.]

Wife cannot charge her husband, after notorious separation by consent, with separate allowance. 1 Lev. 5. 6 Mod. 147, 167. 1 Mod. 9. 124. 1 Sid. 100, 425. 1 Vent. 42, 71. 1 Keb. 69. S. C. Cases B. R. 244. Holt 100. Skin. 323—349.

THE plaintiff was an apothecary, and served the defendant's wife with physic, who lived separate from her husband, and had a separate allowance of 20 *l. per annum*. *Et per Holt C. J.* If baron and feme separate by consent, and she has a separate allowance, it is unreasonable she should have it still in her power to charge him; and it is not to be presumed, but tradesmen that deal with her trust her on her own credit, and not on the credit of her husband, and a personal notice is not necessary; it is sufficient that it be public and commonly known (a).

(a) *Vide* note to *Esherington v. Parrot*, *post*, pl. 10.

7. Woodyer *versus* Gresham.

[Mich. 9 Will. 3. B. R.]

Carth. 30, 415. 1 S. d. 337. 1 Roll. Abr. 351. G. 5. *scire facias* by baron and feme upon a judgment recovered by the feme while she, and after execution awarded, feme dies, it survives to the husband. *Vide* 3 Mod. 186. 1 Mod. 177.

JUDGMENT was recovered by a *feme sole*, who after married, and her husband and she sued a *scire facias*, and had an award of execution; but, before execution executed, the wife died. The husband sued out a new *scire facias*; to which it was demurred. *Shower* objected, that the award on the first *scire facias* made no alteration, for the execution still must be grounded on the first judgment, and not upon the award, and that this being a *chose en action* must go to the administrator of the wife, and not the surviving husband. *Et per Holt C. J.* This case differs not from the case of *Obrian and Ram*, which was in this court, *Mich. 3 Jac. 2. Rst. 192.* Judgment was recovered against

Baron and Feme.

‡ 116

against a *feme sole*, who after married; a *scire facias* was sued out against the husband and wife, and judgment *quod habeat executionem suam* against husband and wife, *de debito & dampnis prædicti*. After this award, and before execution executed, the wife died, and after her death a new *scire facias* was issued against the husband, and he was held chargeable; which proves that the award or judgment *quod fiat executio* on the *scire facias*, makes a plain alteration; for the husband surviving had not been liable upon the first judgment only. By the same reason, the award upon the *scire facias* is attached in the husband, and shall survive, for it is but equal the husband should charge in the same measure he may be charged.

179. Cro. Car.
203, 511. S. C.
Skin. 682.
Comb. 122, 103,
455. 3 Salk. 63.
Holt 101.
* [117]
Morr 762. pi.
1056. 3 Mod.
180, 190. Infra.
Lut. 672. (Cro.
Jac. 223. Cro.
Car. 232.
2 Vent. 195.
Infra.

8. Yard versus Ellard.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 368. S. C.]

ASSUMPSIT quod cum defendens indebitatus fuisset uxori ipsius quer. ut executrici A. in decem libris pro areragiis redditus, et in consideratione quod ipse querens concessisset ei ulteriorem diem pro solutione inde, idem defendens præd. querenti promississet solvere dictas decem libras, &c. Verdict on non assumpt pro quer. And now it was objected, that the wife was not joined, and that she is an executrix and may survive, and the money will be assets, and her life must be averred. Vide Yelv. 84. Et per Cur. That is true: And further, if before recovery the husband had died, she had been restored to her action for the arrears, for that duty was not extinguished by the new promise. On the other side, if the wife had died, the husband could not have sued, which is the reason her life must be averred; but notwithstanding all this, the action is well brought without joining the wife, because she was not privy to this contract, and the husband was to receive the money, and might release it, the administration being devolved on him; and the recovery of the husband will amount to a *devastavit*, because his executor will be entitled to sue out execution; and so it differs from a judgment where the action is brought in the name of the husband and wife.

S. C. Carth.
462. Mod.
Cafes, &c. 341.
Husband of feme
executrix gives a
new day to debtor
of the testator
who makes a
new promise,
husband may
bring the action
without joining
the wife. 2 Cro.
110. 1 Roll.
Rep. 36c. Bro.
Baron and Feme,
57. 1 Brown
20c. Cafes B.R.
207.

9. Anonymous.

[Hill. 1 Ann. B. R.]

WARRANT of attorney was given to confess judgment to a *feme sole* who afterwards married. In this case the Court gave leave, notwithstanding the marriage,

Fær. 53. 1 Roll.
Abr. 351. F. 1.
G. 2. Marriage
revokes a war-

rant of attorney
given to confess
judgment against
feme; aliter if
to her. Co Lit.
310. a. Post
399. 3 Mod.
186. Cumber.
242. 2 Saund.
213. 4 Co. 61.
a. Moor 468.
pl. 668. Show.
91. con.

to enter judgment (a), for that the authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage; like a grant of a reversion to a *feme sole* who marries before attornment; yet the tenant may attorn afterwards: *Aliter*, if a *feme sole* gives a warrant of attorney, and marries; for that is to charge the husband. *Ex motione Mr. King. Contra Show.* 91., and it seems as reasonable he should be charged in this case, as well as for a bond or other debt, which he is liable for during the coverture, though not after. 1 *Rel. Abr.* 351. *F.* 1. *G.* 2. *F. N. B.* 120. *F.*

(a) But if judgment is entered and must be set aside. 3 *Bur.* 1469. up without leave, it is irregular,

[118]

10. Etherington *versus* Parrot.

[Pas. 2 Ann. *coram* Holt C. J. *At nisi prius at Guildhall.* 2 *Ld. Raym.* 1006. *S. C.*]

Wife's contracts
bind the husband
from his pre-
sumed assent on-
ly; not where
he expressly dis-
sents beforehand.
1 *Sid.* 113, 425.
6 *Mod.* 239.
Allen 61. *Ante*
116. 1 *Lev.* 4.
1 *Sid.* 229. *S. C.*
Holt 102. *Vi.*
sup. pl. 6.

IN *case* for goods sold and delivered, the evidence to charge the defendant was, that the defendant's wife bought the goods to make her clothes, and that they cohabited. On the other side it was proved, she was very extravagant, and used to pawn her clothes for money, and get drink with the money; that she had pawned one suit that cost 7*l.* for 20*s.* and being redeemed by the husband, pawned them again for less; and that she needed no clothes when she bought these; and that the defendant, the last time he paid the plaintiff, warned the plaintiff's servant not to trust her any more, and to give his master notice of it. *Et per Holt C. J.*

If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her (a).

But

(a) *R. acc. Str.* 1214. *Bur.* 2177.

The liability of the husband to answer for debts contracted by the wife, is very fully discussed in the celebrated argument of Lord Chief Baron Hale, in *Scott v. Manby*, *Sid.* 109. 2 *Lev.* 4., which is inserted under the title Baron and Feme in *Cunningham's Law Dictionary*, and *Bacon's Abridgment*. In that case a woman departed from her husband without his consent; he prohibited the plaintiff and others to trust her. She requested to cohabit again, which he refused. The plain-

tiff found her goods which were suitable to the husband's degree; and it was ruled that the husband should not be charged. The argument of the Chief Baron agrees with the principles which are laid down in the case in the text. The following cases have also been decided relative to this subject: *Manwaring v. Sands*, 1 *Str.* 706; husband not liable for a hat sold to the wife, who lived from him in adultery, and told the plaintiff she had a husband, but that signified nothing, for she would pay him herself. *Morris v. Martin*,

But if she runs away from her husband, he shall not be bound by any contract she makes (a).

On the other side, while they cohabit, the husband shall answer all contracts of hers for necessaries; for his assent shall be presumed to all necessary contracts, upon the account of cohabiting, unless the contrary appear (b).

But if the contrary appear, as by the warning in this case, there is no room for such a presumption. And there was no necessity in this case, and notice to the servant was sufficient (c).

Also the Chief Justice said, that if a woman takes up goods, as silk, for the purpose, and pawns them before they are made into clothes, the husband shall not pay for

Ante 113. Post
119. 2 Lev.
116. 1 Mod.
9, 124, 128,
141, 142.
1 Vent. 1, 42.
1 Sid. 425.

If a woman takes up materials, and pawns them before they are

Martin, 1 Str. 647; husband not liable for necessaries provided for the wife living from him in adultery, though the plaintiff had no notice. *Child v. — Hardyman*, 2 Str. 875; the wife living with her husband conducted herself in a lewd manner; she left her husband and lived at another place; but it did not appear that she then lived in adultery. The husband being applied to to receive her again, said if she came again she should never sit at the upper end of his table, nor have the government of his children, but should live in a garret. A proposal was then made to and rejected by him to give her a pecuniary allowance. She then bought goods; and he was held not liable. The three preceding cases were before Lord Raymond at nisi prius. — *Bolton v. Prentice*, 2 Str. 1214; the defendant and his wife lodged at the plaintiff's, who furnished her with goods. The husband left the lodgings, paid the plaintiff, and forbade him to trust her again. They cohabited some time, when he left her, without any cause appearing; and on her finding him out, refused to admit her, struck her, and declared he would not maintain her, or pay any body that did. The plaintiff supplied her with necessaries, and the defendant was held to be answerable. *Harris v. Lee*, 1 P. Wms. 482; the husband gave his wife the foul distemper,

who came up to town to be cured, and borrowed money to pay the surgeons, and for necessaries. The husband having died after charging his land with debts, it was decreed that the person who had lent the money should in equity stand in the place of those who had supplied the necessaries, &c. *Fowler v. Dinely*, 2 Str. 1122. N. P.; the wife was in custody in execution for a misdemeanor; but the plaintiff kept her at his own house, and (being a spunging-house within the rules) supplied her with necessaries. On account of the illegal manner of confinement, the husband was held not answerable. *Jenkins v. Tacker*, H. Bl. 90; the husband being abroad when the wife died, her father paid the funeral expences proportionate to the husband's fortune. Ruled that he should recover.

If a man cohabits with a woman, allows her to assume his name, and passes her to the world for his wife, though in fact he is not married to her; he is liable to her contracts for necessaries, per Ld. Mansfield, *Hudson v. Brent*, N. P. *Espinasse* 124. Carr v. King, 12 Mod. 372. Action was brought against A. for the lodging of his wife, and proof that he formerly cohabited with her, and owned her as his wife, was held sufficient. *Vide Bac. Abr., Baron and Feme; Gilb. Law of Evidence* (5th edit. 363).

(a) *R. acc. Str.* 647, 706, 875, 1122.

(b) 1 Sid. 128. *Skin.* 349. 1 *Brownl.* 47.

(c) 1 Sid. 129. 1 Lev. 5.

them,

made into
clothes, husband
is not liable.

Fitz. Debt. 41.

them, because they never came to his use : Otherwise, if
made up and worn, and then pawned.

Cro. Jac. 258.

11. War *versus* Huntly.

[Pas. 2 Ann. *coram* Holt C. J. *At nisi prius in Middlesex.*]

Money earned
by the wife liv-
ing *separate*, shall
go towards her
maintenance.
S. C. Holt 102.
Wi. 1 Atk. 278.

THE case was, An ordinary working-man married a
woman of the like condition ; and after cohabitation
for some time the husband left her, and, during his ab-
sence, the wife worked ; and this action being brought for
her diet, it was held, that the money she earned should go
to keep her.

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12. Ruffel & Ux. *versus* Corne.

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1031. S. C.]

S. C. 6 Mod.
127. Holt 699.
2 Cro. 502.

Imprisonment of
wife *per quod*
negotia of the
husband *infesta*
remaner' ad
dampnum of
both, held well
after verdict.
Matter may be
laid by way of
aggravation, for
which no action
will lie. Mod. Cases, &c. 26. 10 Rep. 131. Cro. Car. 90. S. C. 2 Salk. 640. by the name
of Ruffel *versus* Camb. 2 Salk. 593, 594, 642. Show. 180. 1 Keb. 787. 1 Stran. 61.
Jon. 440.

TRESPASS and false imprisonment, by baron and
feme, *per quod negotia domestica* of the husband *reman-*
serunt infesta ad grave dampnum ipsorum. After verdict for
the plaintiffs, it was objected in arrest of judgment, That
here being a special damage laid to the husband, the action
should have been brought by him alone. But it was held
good, because matter may be laid for aggravation of da-
mages, for which no action would lie ; as breaking his
house, and beating his daughter ; and yet trespasses will not
lie for beating his daughter (a), *p.* 642. And the plaintiff
had judgment (b).

by the name
of Ruffel *versus* Camb. 2 Salk. 593, 594, 642. Show. 180. 1 Keb. 787. 1 Stran. 61.
Jon. 440.

3 H. dol. 521. (a) *R. acc. Bur.* 1878. 2 Bl. Rep. 810. *Vide* 11 Mod. 264.

(b) Lee Ch. J. said, *Str.* 1094.
That in a manuscript note he had seen
of this case, Holt C. J. said he would
not intend the judge suffered the hus-
band's business being undone to be
given in evidence. Where the *gist* of
the action is the assault on the wife,
she must join, and the suit does not
survive to the husband ; *Higgins v.*
Butcher, *Yelv.* 89. *Smith v. Sykes*,
Freem. 224. But the husband alone
may bring an action for assaulting the
wife *per quod consortium amisit.* *Hyde*
v. Seyfer, *Cro. Jac.* 538 ; or for
wounding the plaintiff and assaulting
his wife, *per quod*, *Ec. Guy v. Livesey*,

Cro. Jac. 501 ; or for breaking and
entering his house, and assaulting his
wife (the assault of the wife being in
such case matter of aggravation) ; *Dix*
v. Brookes, 1 *Str.* 61 ; or for break-
ing his house, beating his wife, and
taking his goods ; *Read v. Marshall*,
8 *Mod.* 26 *Fortesc.* 377 ; or for ma-
liciously prosecuting the plaintiff and
his wife, by which they were both
scandalized, the husband interrupted
in his trade, and put to expence ; *Smith*
v. Hixon, 2 *Str.* 977. (In that case
the plaintiff was found not guilty as
to the husband, and it was moved in
arrest of judgment that the wife should
have

have been joined, as to the remainder; —but the objection was over-ruled.) Where the action is only maintainable on account of an injury to the husband, and the wife joins, it is ill, and not cured by the verdict; as for trespass on the close of the husband, *ad damnum ipsorum*, *Marshall v. Doyle*, *Cro. Jac.* 473. So for a battery upon husband and wife *ad damnum ipsorum*, *Cole et ux v. Turner*, 6 *Mod.* 149. So in an action by husband and wife, who kept a victualling-house, for calling the wife a bawd, by which they lost their custom *ad damnum ipsorum*. The words being only actionable by reason of the special damage, and the special damage being wholly the husband's; *Coleman & ux. v. Harecourt*, *Lev.* 140. *Baldwin v. Flower*, 3 *Mod.* 120. In cases where there is a proper cause of action in the wife, though circumstances are added which are only actionable by the husband, the declaration is good by husband and wife, and the additional circumstances are only regarded as matter of aggravation. Such is the case in the text. So an action for imprisoning

the wife until the husband paid 10*l.* *Brown v. Tripe*, 2 *Keb.* 230. *ac. Bro. Bar. & Feme*, cites 46 *E.* 3. 3. So for assaulting the wife and driving a coach over her, and that the husband laid out money in her cure; *Todd et ux. v. Redford*, 11 *Mod.* 264. So for that defendant assaulted the wife *et alia enormia eis intules ad damnum eorum*, *Thomas v. Hoe*, *Cro. Jac.* 664. So for beating the wife and taking the goods of the husband *ad damnum ipsorum*; *Thomas v. Newark*, *Hestl.* 2. So in trespass by husband and wife, and *J. S. quare clausum fregit, herbam suam mesuit et fœnum suum asportav.* *ad damnum ipsorum*, though the wife could not join for the *asportav.* of the hay, *Wilkes v. Parsons*, *Leon.* 105. *Cookson v. Castline*, *Cro. El.* 96. There is a contrary decision in *Staunton v. Hobart*, *Sid.* 224. *Keb.* 784., where trespass by husband and wife for beating her and tearing her coat *ad damnum ipsorum* was held bad after verdict, *dissentient Wyndham*. But that single case cannot countervail all the preceding authorities.

13. Robinson *versus* Greinold.

[*Paf.* 3 *Ann. coram Holt C. J. At nisi prius at Guildhall.*]

THOUGH the wife be ever so lewd, yet while she cohabits with her husband he is bound to find her necessities and pay for them, for he took her for better for worse; so if he runs away from her, or turns her away: But if she goes away from him, when such separation becomes notorious, whoever gives her credit, does it at his peril (*a*), for the husband is not liable, unless he takes her again; for then it is as if a woman had eloped at common law, she thereby lost her dower; but if she came again, and the husband received her, the right of dower is revived.

2 *Lev.* 16. 2 *Keb.* 554. *Lit. Rep.* 307. 1 *Roll.* 351. *Co. Lit.* 32. a. b. *Sid.* 129. *Skin.* 323. *Mod. Cases* 171.

S.C. 6 *Mod.*
171. *Holt* 103.
1 *Keb.* 69, &c.
1 *Vent.* 42.
2 *Vent.* 253. 114.
1 *Lev.* 47.
1 *Mod.* 124,
129. Husband
not liable for ne-
cessaries of the
wife after elope-
ment notorious,
unless he takes
her again. *Ante*
113, 116, 118.

(*a*) *R. acc. Str.* 647, 706, 875.

14. Haydon *versus* Gould.[4 Julii, 9 Ann. *At the Court of Delegates in Serjeants-Inn, Fleet-street.*]

Marriage by a mere layman and cohabitation, will not entitle the man to administration to the woman. *Q* as to the woman and issue.
1 Danv. 700. pl. 21.

[120]

ONE had issue three daughters. *Margaret*, married to *Richard Gould*; *Elizabeth*, who married *Franklin*; and *Rebecca*, who married *Haydon*. *Rebecca* deposited 180 *l.* in the hands of *Gould*, and took his bond payable to *Franklin* for her use; *Rebecca* died, and *Haydon* her husband took administration. And now *Richard Gould* and his wife sued a repeal upon this suggestion, That *Rebecca* and *Haydon* were never married; and it appeared in fact that they were Sabbatarians, and married by one of their ministers in a Sabbatarian congregation, and that they used the form of the common prayer, except the ring; and that they lived together as man and wife as long as the woman lived, *viz.* seven years. On the other hand it appeared, that the minister was a mere layman, and not in orders; upon which the letters of administration were repealed, and new administration granted to *Margaret Gould*, &c., and now that sentence upon an appeal was affirmed by the delegates; for *Haydon* demanding a right due to him as husband, by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself in this case: And though perhaps it should be so, that the wife who is the weaker sex, or the issue of this marriage who are in no fault, might entitle themselves by such marriage to a temporal right, yet the husband himself, who is in fault, shall never entitle himself by the mere reputation of a marriage, without right. In this case it was urged, that this marriage was not a mere nullity, because by the law of nature the contract was sufficient; and though the positive law ordains that marriage shall be by the priest, yet that makes such a marriage as this irregular only, but not void; unless the positive law had gone on and ordained it expressly to be so. *Vide Mo.* 169, 170. *Bract. lib.* 4. c. 8, 9. 3 *Ja.* 1. c. 5, 13. But the Court ruled *ut supra*: And a case was cited out of *Swinb.* where such a marriage was ruled void: And an act of parliament was made to confirm the marriages contracted during the usurpation, *viz.* 13 *Car.* 2. c. 35. and the constant form of pleading marriage is, that it was *per presbyterum sacris ordinibus constitutum* (a).

(a) *Vide stat.* 26 G. 2. c. 33.

Bastard.

1. *Pride versus* The Earls of Bath and Montague.

[Hill. 6 Will. 3. B. R.]

EJECTMENT by *Pride* against the Earls of *Bath* and *Montague*. *Pride* the plaintiff made title, as heir to *George* Duke of *Albemarle*, proving himself the son of one who was brother to the Duke, and that the Duke died without issue. The defendants gave evidence, that Duke *George* had issue Duke *Christopher*, who conveyed to him. Plaintiff gave evidence that Duke *Christopher* was a bastard, begotten of such a woman, who at the time of her marriage with the said *George* Duke of *Albemarle*, was married to another man, who was then and yet living. Upon this it was objected, that * since Duke *George* and this woman lived together as man and wife, and were now dead, the plaintiff could not be admitted to bastardize the issue, who was dead also; and who, during his whole life, was reputed and taken to be the legitimate son of the duke, and styled by the duke himself in his deed of settlement, and his last will and testament, his son and heir; *et quod justum non est aliquem post mortem facere bastardum*. The Court held this true of such a bastard as is meant by *Lit.* in his case of *bastard eigne* and *mulier puisne*, i. e. such a bastard as is born before the espousals of a father and mother who marry afterwards; and said the rule extended only to that case. If *H.* marries a woman, and that woman marries again, living *H.*, the last marriage is void without any divorce; and the jury shall try the fact which proves it no marriage. And the reason why the Spiritual Court cannot give sentence to annul a marriage after the death of the parties is, because the sentence is given only *pro salute animæ*, and then it is too late.

S. C. 3 Lev. 410. Holt 236. The rule that H. shall not be bastardized after his death, holds only in the case of bastard eigne & mulier puisne. 3 Lev. 340. 1 Brownl. 42. 7 Co. 44. b. Co. Lit. 33. a. 244. a. 5 Co. 98. b. Spiritual Court cannot give sentence to annul marriage after parties are dead, because they proceed only *pro salute animæ*. 2 Salk. 548. Fitz. Bastardy 18. Br. Rast. 43. 1 Roll. Abr. 340.

* [121]

2. *Rex versus* Barebaker.

ORDER of Justices to pay so much money by week, till the child is fourteen years of age, is naught; for the Justices have no power but to indemnify the parish; and

Post 478. S. C. 1 Sid. 222. Order to pay, &c. till the child shall be 14 years old.

is ill. 1 Vent. and that is only to oblige him to maintain the child as long
 336. 1 Mod. as it is or may be chargeable (a).
 20. Black. 234.
 Set. and Rem. 145.

(a) *Vide Q. and Smith*, 11 Ann. Cas. of S. 64. Str. 788.

3. Wood's Case.

[Mich. 10 Will. 3. B. R.]

Bastard born in
 B. pending an
 illegal order of
 removal of the
 mother from A.
 to B. (which is
 after reversed), is
 settled in A. Post
 474, 486, 528,
 532. Elask. 204. S. C. Set. and Rem. 147. Str. 476. Cases of S. 66. 3 Salk. 66.

A Woman big with child was removed by order of two Justices from A. to B., and was there brought to bed. B. appealed, and on the appeal the woman was sent back to A. *Et per Curiam*: So ought the child; for all was suspended by the appeal: And now the mother's right of settling upon B. is avoided *ab initio*.

4. Inter Inhabitan. Paroch. Westbury & Cosham.

[T. 11. 3 Ann. B. R.]

Mod. Cases 213.
 2 Salk. 474.
 532.

A Poor woman with child being unmarried, was by order of two Justices removed from *Westbury* in *Wilt*s to *Cosham*, and brought to bed there. *Cosham* appealed at the next sessions, and the order was reversed. Afterwards, by order of two Justices, the child was sent to *Cosham*: they appealed, and the order was confirmed. At last all was removed into B. R. *Et per Cur.* The birth at *Cosham* did not settle the child there, because it was under an illegal order procured by *Westbury*; which order being reversed, the matter is no more than this, that they unjustly procured the woman to go thither.

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5. Regina versus Murrey.

[Mich. 3 Ann. B. R.]

If H. be ultra
 mare during the
 whole time of
 his wife's going
 with child, the
 child is a bas-
 tard; otherwise
 not. Post 123,
 483. Co. Lit.
 244. 2. Br.
 Bastardy, 20, 21.

UPON a special order of sessions, the question was, If the husband be *ultra mare*, and during the time the wife be got with child, whether this child be a bastard within the 18 of *Elizabeth*, cap. 3.? *Et per Cur.* If the husband was out of the four seas during all the time of the wife's going with child, the child is a bastard; but if he were here at all within the time, it is legitimate, and no bastard. And because it did not appear by the order that the

the husband was absent all the time, the order was quashed (a).

(a) The doctrine concerning the four seas is now exploded; proof of non-access, though both parties are in England, is sufficient; *Vi. Strange* 925, 1076. *Andr.* 8. *Vi.* also *Rep. B. R. temp. Hard.* 79, 379. And in *Goodright* against *Saul* and others, 4 *V. R.* 356. it was held, that it was not absolutely necessary to *prove non-access*, when the husband was within the realm, by witnesses who could prove him constantly resident at a distance from his wife; but that *other circumstances*, which went strongly to rebut the presumption of access, were sufficient. *Vi.* 3 *Williams* 270.

6. Regina versus Weston.

[*Trin.* 4 *Ann. B. R.* 2 *Ld. Raym.* 1197. *S. C.*]

THE defendant being adjudged the father of a bastard by two Justices, exception was taken to the order. 1st, That he was ordered to pay so much weekly to the overseers of the poor: *sed non alloc.* For as before the institution of overseers, the Justices might in these cases order the money to be paid to two or three of the inhabitants, so now they may to the overseers. The second exception was, that it was said, we the said two Justices *doth adjudge*, &c. which is the singular instead of *do*; and 1 *Cro.* 489. was cited to make this good. That was an indictment on the 3 *H. 7. c. 2.* against *Fulwood* and others, *quod ipsi cepit for ceperunt.* But the roll of that case being searched, which is in *Hill.* 13 *Car. 1. Rot.* 24. *inter placita coron.* the indictment was *ceperunt* and not *cepit*; wherefore this order was quashed. *Note*, This cause came into court *Pasf.* 4 *Ann.* by *habeas corpus*; and the case was, that *Weston* had appealed to the sessions where the order was confirmed, and he committed for not paying the money ordered. And Mr. *King* took this exception to the return of the *habeas corpus*, *viz.* That the sessions should have proceeded against him upon his recognizance. *Et per Holt* Chief Justice, If they proceed on the 18 *Eliz.* the sessions has no power to commit, but to proceed on his recognizance: But if on the 3 *Car. 1.* the sessions may commit, as the two justices might have done; that is, unless the party put in security to perform the order, or to appear at the next sessions.

Money may be ordered to be paid to the overseers. *Black.* 236. *S. C. Set. and Rem.* 155. *Holt* 107.

Order quashed because the words of adjudication were in the singular number instead of the plural.

By 18 *Eliz. c. 3.* Sessions must proceed on recognizance. By 3 *Car. 1.* may commit.

Note, By the *Rep.* in *Ld. Raymond* it appears, that the order was quashed a second time for saying that the justices *doth adjudge*, instead of *do*.

7. Inter the Parishes of St. George and St. Margaret, Westminster.

[Mich. 5 Ann. B. R.]

Child begotten after divorce à mensa & thoro, shall be taken to be a bastard; otherwise after voluntary separation, unless found that the husband had no access. Ante 122. Co. Lit. 235. a. Black. 237. S. C. Set. and Rem. 154. Rep. A. Q. 106.

R. Str. 51.

UPON a special order of sessions, wherein the fact was stated for the opinion of the Court, the case was, 'That H. was divorced à mensa & thoro, and afterwards his wife lived with one *Ellis* in adultery, in the parish of St. Giles, and had several children called *Ellis*, and registered as his. *Et per Cur.* When a woman is separated from her husband by such a divorce, the children she has during the separation are bastards; for we will intend a due obedience to the sentence, unless the contrary be shewed; but if baron and feme without sentence part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved; for access shall be intended: but if a special verdict find the man had no access, it is a bastard; and so was the opinion of my Lord Hale in the case of *Dickens* and *Collins*.

8. Inter the Parish of Budworth and Township of Dumphly in Lanc.

[Hill. 5 Ann. B. R.]

Black. 238. S. C. Set. and Rem. 157. Order for maintenance does not determine the settlement of a bastard.

UPON an order made thirty years ago, on the parish of *Budworth*, for maintenance of a bastard-child born in the township of *Nether Dumphly* within that parish, which order was now removed before the Court by *certiorari*, it was held,

1st, That an order made upon the overseers of any parish by two justices, for raising a sum towards the maintenance of a bastard or poor person, does not determine the settlement of that person in that parish, for the right of settlement is not contested but presumed.

Statute 13 & 14 Car. 2. c. 12. § 21. relates only to maintenance of poor, not bastards.

2dly, That the clause in the statute of the 13 & 14 Car. 2. c. 12. which provides that distinct townships of large parishes in the northern counties shall respectively provide for their poor, under the penalty mentioned in the 43 *Eliz. c. 2.*, must be understood with respect to the maintenance of poor and impotent persons, and not (a) with respect to bastards who are provided for by other statutes: But if a bastard be grown up, and by accident grows impotent, he may be relieved as a poor person within that statute.

(a) The practice is otherwise, and this seems merely a *dissum*.

9. *Regina versus Odam.*

[Mich 12 Ann. B. R.]

ORDER for maintenance of a bastard-child was accepted to by Mr. *Page*, because the defendant is, upon sight of the order, to pay 9*l.* in gross, and after that so much weekly. *Et per Cur.* By the statute the justices are to take order for relief of the parish; and keeping of the child, by payment of money weekly, or other sustentation; and this may be only indemnifying the parish for money laid out before the reputed father was found.

Justices may order payment of a sum in gross.
1 Sid. 222, 226.
1 Vent. 336.
Ante 121.
Black. 240. S.C.
Sett. and Rem.
258. 2 Mod.
Cases 4.

Bills of Exchange.

1. *Clark versus Mundal.*

[3 W. & M. coram Holt C. J. At nisi prius at Guildhall.]

A. Having a bill of exchange payable to him, and he being indebted to *B.* in a sum of money, sends and indorses this bill to *B.* Afterwards *B.* brought *assumpsit* against *A.* for the money, and on *non assumpsit* *A.* gave in evidence this bill of exchange indorsed, and that it had lain so long in *B.*'s hands after it was payable, and reckoned it as money paid and in his hands; but it was disallowed; for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. If *A.* sells goods to *B.*, and *B.* is to give a bill in satisfaction, *B.* is discharged though the bill is never paid, for the bill is payment: But otherwise a bill should never discharge a precedent debt or contract; but if part be received, it shall be only a discharge of the old debt for so much (*a*).

A. gives to *B.* a bill of exchange on *C.* in payment of a former debt. Not allowed as evidence on non assumpsit, unless paid. *Far.* 139. *Show.* 156. *Mod.* Cases 36.
2 Salk. 442.
3 Salk. 68. S.C.
Cases B. R. 203.
Holt 114. See
2 Wilson 353.

(*a*) By stat. 4 and 5 Ann. ch. 9. sum of money formerly due to him, § 7. it is enacted, that if any person this shall be accounted and esteemed accept a bill of exchange for and in a full and complete payment of such satisfaction of any former debt, or debt, if such person do not take
Vol. I. M his

his due course to obtain payment of it, according to the act either for non-acceptance or non-payment.
by endeavouring to get the same accepted and paid, and make his protest

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2. Hodges *versus* Steward.

[Pasch. 3 W. & M. B. R. 1 Ld. Raym. 181. S. Cafe cited.]

1 Salk. 68. S. C.
Skin. 346.
Comb. 204.
Cafe B. R. 36.
Bill payable to
H. or bearer, is
not assignable to
charge the draw-
er. 3 Lev. 299.
6 Mod. 36, 37.
3 Mod. 86.
Moll. L. 2. c. 10.

IN an action on the case on an inland bill of exchange brought by the indorsee against the drawer, these following points were resolved :

1st, A difference was taken between a bill payable to *J. S.* or bearer, and *J. S.* or order ; for a bill payable to *J. S.* or bearer is not assignable by the contract so as to enable the indorsee to bring an action, if the drawer refuse to pay, because there is no such authority given to the party by the first contract, and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise (a). But when the bill is payable to *J. S.* or order, there an express power is given to the party to assign, and the indorsee may maintain an action (b).

But such assign-
ment charges the
indorser. Post
133. Show.
125. Skin. 410.

2dly, Though an assignment of a bill payable to *J. S.* or bearer be no good assignment to charge the drawer with an action on the bill, yet it is a good bill between the indorser and indorsee, and the indorser is liable to an action for the money ; for the indorsement is in nature of a new bill.

Drawing a bill
makes a mer-
chant to that
purpose. 2 Vent.
295, 310.
Carth. 82, 83.

3dly, It being objected, That in this case there was no averment of the defendant's being a merchant, it was answered by the Court, that the drawing the bill was a sufficient merchandizing and negotiating to this purpose.

2 Vent. 292.
1 Lev. 298.
Cro. Jac. 308.
Skin. 398.

4thly, The plaintiff declared on a special custom in London for the bearer to have this action. To which the defendant demurred, without traversing the custom ; so that he confessed it, whereas in truth there was no such custom ; and the Court was of opinion, that for this reason judgment should be given for the plaintiff ; for though the Court is to take notice of the law of merchants as part of the law of England, yet they cannot take notice of the

(a) *R. cont.* 3 Bur. 1516. *Vide St.*
3 & 4 Ann. c. 9. 3 T. R. 179.

(b) It is settled by the case of *Grant v. Vaughan*, 3 Bur. 1516. 1 Bl. 485. *Miller v. Race*, 1 Bur. 452., that both bills of exchange and promissory notes payable to bearer are transferable, and the bona fide holder has a right to bring an action upon them. In the great case of *Minet and another, bona fide indorsees,*

v. Gibson and others, acceptors, before the House of Lords, bills payable to and indorsed in the name of a fictitious payee, with the knowledge as well of the acceptors at the time of their acceptance as of the drawers, were considered as payable to bearer, and, as such, to be the subject of an action. *Vide* 3 T. R. 481. 1 H. Black. Rep. G. B. 569.

custom of particular places (a); and the custom in the declaration being sufficient to maintain the action, and that being confessed, he had admitted judgment against himself.

5thly, It was held that a general *indebitatus assumpsit* will not lie on a bill of exchange for want of a consideration, for it is but an evidence of a promise to pay, which is but a *nudum pactum*; and therefore he must either bring a special action on the custom of merchants, or else a general *indebitatus* against the drawer for money received to his use (b). Judgment *pro quer.*

General indebitatus will not lie on a bill of exchange. 1 Vent. 152. Hard. 485. 1 Mod. 285. 2 Keb. 695, 713, 758, 822. 5 T. Rep. 483.

Nota. If a promissory note be made to J. S. and bearer, the bearer cannot bring an action on this note in his own name, but he may in the name of the principal; and the bare possession of the note is, for that purpose, a sufficient authority. *Nicholson versus Sedgwick.* Hill. 1696 7. C. B. This *nota* is copied from a *NISS.* rep. of Judge Blencowe. 1 Ld. Raym. 180. S. C.

(a) *R. ac. 1 Will. 9. Str. 1187.*

(b) The conclusion resulting from the "several cases upon this subject" seems to be this; that where a privity exists between the parties, there an action of debt or *indebitatus assumpsit* may be maintained; but where it does not exist, neither of these actions will lie.

A privity exists between the payee and drawer of a bill of exchange, the payee and indorser of a promissory note; the indorsee and his immediate

indorser of either the one or the other, and perhaps between the drawer and acceptor of a bill, provided that in all these cases a consideration passed respectively between the parties.

But it seems to be considered, that no privity exists between the indorsee and acceptor of a bill, or the maker of a note, or between an indorsee and a remote indorser of either; *Kyd's Treatise on Bills and Notes*, 114. *Vide* 1 *Burr.* 373.

3. Pinkney versus Hall.

[126]

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 175. S. C.]

BY the custom of *England*, where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both, if it concerns the trade; otherwise, if it concerns the acceptor only in a distinct interest and respect.

5 Mod. 398. 6 Mod. 36. 2 Salk. 442. Mar. 16. H. Bl. Rep. 155.

Acceptance of bill upon two partners by one, binds both, if it concerns the joint trade.

4. Clark versus Pigot.

[Pasch. 10 Will. 3. B. R.]

CLARK having a bill of exchange payable to him or order, puts his name upon it, leaving a vacant space blank, and sends it to J. S. his friend, who got it accepted; and sends it to a friend to get accepted,

is not precluded from bringing an action in his own name. Post 128, 130. Case B. R. 192. S. C.

ed; but the money not being paid, *Clark* brought an *indebitatus assumpsit* against the acceptor: And it was objected on evidence, that the property was transferred to *J. S.* *Et per Holt C. J.* *J. S.* had it in his power to act either as servant or assignee: If he had filled up the blank space making the bill payable to him, that would have witnessed his election to have received it as indorsee; but that being omitted, his intention is presumed to act only as servant to *Clark*, whose name he would use only in order to write the acquittance over it (a).

(a) *Vide ac. Str.* 1103.

5. Anonymous.

[Mich. 10 Will. 3. *coram* Holt C. J. *At nisi prius at Guildhall.*]

Trover for a bank bill will lie against a person finding it, but not against his assignee. Post 128, 284. Cro. El 723. Cro. Car. 261. Cro. Jac. 637. Haid. 111.

A Bank bill payable to *A.* or bearer, being given to *A.* and lost, was found by a stranger, who transferred it to *C.* for a valuable consideration. *C.* got a new bill in his own name. *Et per Holt C. J.* *A.* may have trover against the stranger who found the bill, for he had no title, though the payment to him would have indemnified the bank; but *A.* cannot maintain trover against *C.* by reason of the course of trade, which creates a property in the assignee or bearer (a).

(a) If a bank note, a note payable to bearer, or a bill of exchange, indorsed blank, is stolen or lost, and afterwards comes into the hands of any person *bona fide*, for a valuable consideration, and without notice, such person may recover in an action there-

upon, or may maintain trover against any person getting it into his possession; *Miller v. Race*, 1 Burr. 452. *Grant v. Vaughan*, 3 Bur 1516. 1 Bl. Rep. 485. *Peacock v. Rhodes*, Doug. 632.

6. Anonymous.

[Mich. 10 Will. 3. *coram* Holt C. J. *At nisi prius at Guildhall.*]

Indorser is liable only in default of drawer. *Vide* infra *Harry vers. Peritt* cont. Post 133. Show.

A Bill of exchange being made payable to *A.* or order, *A.* indorses it to *B.* *B.* cannot sue *A.* unless he first endeavour to find out the first drawer to demand it of him; for the indorser is only a warrantor for the payment of the drawer, and therefore liable only on his default; and

and such endeavour must be set forth in the declaration (a),

Rep. 319. Post
127. pl. 9.
3 Mod. 86.

(a) This is the case which is reported *infra* pa. 127. by the name of *Lambert v. Pack*. The real name of it is *Lambert v. Oakes*. From the report in *Ld. Raymond* 443, (by that name,) it appears that it was not an action upon a bill of exchange, but on a promissory note, in which it was necessary to prove a demand on the drawer, because when a promissory note is indorsed, it is an order by the

indorser upon the maker of the note, (his debtor by the note,) to pay to the indorsee. But in the case of a bill of exchange which is to be paid by the drawee, a demand on the drawer is unnecessary. So ruled 2 *Bur.* 669, where the subject is very fully discussed, and this case particularly examined by *Lord Mansfield*. *R.* also with regard to foreign bills, 1 *Str.* 441. *Vi.* 1 *Atk.* 281.

7. *Allen versus Dockwra.*

[127]

[*Mich.* 10 *Will.* 3. *coram* Treby C. J. *At nisi prius* at Guildhall.]

A Bill was drawn on *Sutor* payable in three days. *Sutor* broke; the person to whom it was payable kept the bill by him four years, and then brought *assumpsit* against the drawer. *Et per Treby C. J.* When one draws a bill of exchange, he subjects himself to the payment, if the person on whom it was drawn refuses either to accept or pay: Yet that it is with this limitation, that if the bill be not paid in convenient time, the person to whom it is payable shall give the drawer notice thereof; for otherwise the law will imply the bill paid, because there is a trust between the parties, and it may be prejudicial to commerce if a bill may rise up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts are adjusted between the drawer and drawee (b).

At common law drawer was not chargeable unless he had notice of drawee's non-payment in convenient time. Post, pl. 9. *Show.* Rep. 319. 1 *Lill.* 234. 1 *Vent.* 45.

(b) If payment is not applied for as soon as due, the holder must sustain the loss; 2 *Str.* 829. *Vi.* 1 *Str.* 707. *Com.* 57. *Bl.* 747. *Deng.* 634. 1 *T.R.* 167.

8. *Jackson versus Pigot.*

[10 *Will.* 3. *B. R.* 1 *Ld. Raym.* 364. *S. C.*]

THE plaintiff declared on a bill of exchange drawn by J. S. on the defendant, dated the 25th of *March* 1696, payable a month after sight, and that *postea*, *scilicet* 27th of *April* 1697, he shewed it to the defendant, and he promised to pay it *secundum tenorem bille prae*. After verdict for the plaintiff on *non assumpsit*, it was moved in arrest

Promise to pay *secundum tenorem* bill after the day paid. 5 *Mod.* 307. *Carth.* 457. *S. C.* *Cases B. R.* 211.

Post 129. pl. 22. rest of judgment, that this manner of declaring was absurd, it being impossible to pay *secundum tenorem billæ* at the time of the promise. *Et per Cur.* Where the time of payment is past at the acceptance of the bill, the acceptance can be only to pay the money; and if he was so absurd as to promise to pay the money *secundum tenorem billæ*, yet that is no more in law now than a promise to pay the money generally. But it is better to declare in such a case on a general promise to pay the money. *Per Holt C. J. (a).*

(a) *Vide Deng.* 640. 1 T. R. 235.

9. Lambert *versus* Pack.

[Pas. 11 Will. 3. *coram* Holt C. J. *At nisi prius in London* (b).]

What things are necessary to be proved to charge indorser of a bill of exchange in an action by the indorsee. Ante pl. 7. Ante 126. pl. 6. Post pa. 133. pl. 20.
[128]
Ante 127. pl. 7.

AN action on the case was brought on a bill of exchange against the indorser; and it was ruled by *Holt C. J.* upon evidence, 1st, That there is no need to prove the drawer's hand, because, though it be a forged bill, the indorser is bound to pay it (c). 2dly, The plaintiff must prove that he demanded it of the drawer, or him upon whom it was drawn, and that he refused to pay it, or else that he sought him and could not find him; for otherwise he cannot resort to the indorser (d). 3dly, That this was done in convenient time; for if they stand and are responsible a convenient time after the assignment, and no demand made, the indorsee shall not charge the indorser. The time for foreign bills is three days, and no allowance is to be made for Sundays and holidays. Serjeant *Wright* cited a case of one *Tracy*, who stood a week after the indorsement, and the indorsee lost his money; which *Holt* Chief Justice thought was too strait; but such matters must be left to the jury (e). 4thly, It is a question whether notice must be given, or no; but it is fair to give no-

If a bill be indorsed with the name only, the

(b) *Fide* note to pl. 6. pa. 126.

(c) The law is the same in this respect in an action against the acceptor; *Tenney v. Fowler*, 2 Str. 936. In an action against an indorser it is not necessary to prove the hand of any preceding indorser, *Kyd* 50; but against the acceptor it is necessary to prove the hand-writing of the payee, and, in case of special indorsement, of the special indorsee; *Smith v. Chester*,

1 T. R. 654. And where a bill payable to J. S. or order got into the hands of another person of the same name, who indorsed it, and (being accepted by the defendant) it was paid by that person to the plaintiff, who did not know him—it was ruled that the plaintiff could not recover; *Mead v. Young*, 4 T. R. 28.

(d) *Vide sup.* pl. 6.

(e) *Vide sup.* pl. 7.

tice.

rice (a). 5thly, That the demand must be proved subsequent to the indorsement; for if it was precedent, he could only act as servant to the indorser; and so the demand was insufficient to charge the indorser. 6thly, If a man indorses his name upon the back of a bill blank, he puts it in the power of the indorsee to make what use of it he will (b), and he may use it as an acquittance to discharge the bill, or as an assignment to charge the indorser. 7thly, In cases of bills purchased at a discount, this is the difference; if it be a bill payable to A. or bearer, it is an absolute purchase; but if to A. or order, and it is indorsed blank, and filled up with an assignment, the indorser must warrant it as much as if there had been no discount (c).

indorsee may make what use of it he will. Ante 126. pl. 4.

(a) Notice must be given of a refusal to pay, and also of a refusal to accept; and if notice is not duly given, a subsequent promise under ignorance of that circumstance will not be binding; *Blissett v. Husb*, 5 Bur. 2670. *Goodall v. Dolley*, 1 T. R. 712. Where the parties to whom notice is to be given reside at a different place from the holder and drawer, notice must be sent by the next post; 1 T. R. 167. Where the holder called on the drawer of a note the day it became due, and not finding him within, left word that it was due, and desired the drawer would send to take it up; on the next day he called again, and the drawer promised to pay the same day, which he did not; and on the third day he called again, and not finding him in, sent the note to the indorser, and all the parties lived in the same place; it was ruled that notice should have been

given by the holder to the indorser on the first day; *Tindal v. Brown*, 1 T. Rep. 167.

If the drawee has not effects of the drawer in his hands, notice of non-acceptance need not be given to charge the drawer; but the same circumstance does not remove the necessity of notice to charge the indorser; *Beckerdike v. Bollman*, 1 T. R. 405. Demand from the acceptor, and notice to the indorser, must be alleged in the declaration; and the omission thereof is not cured by verdict; *Doug* 679.

(b) A person indorsing his name on a blank note or check, is liable to answer as indorser upon any note or bill afterwards written therein; *Ruffel v. Langstaff*, *Doug* 514.

(c) *Vide acc.* *Bank of England v. Newman*, Com. 57. *Hill v. Lewis*, *Skin*. 411. *Holt* 117.

10. Starkey versus Cheeseman.

[Mich. 11 Will. 3. B. R. 1 Ld. Raym. 538. S. C.]

PLAINTIFF declared on a bill of exchange against the drawer, shewing that the party on whom it was drawn refused to pay it, *per quod onerabilis, devenit, &c.* but laid no express promise: He also laid an *indebitatus assumpsit* and a *quantum meruit*. There was judgment by default, and a writ of inquiry; and now *Carthew* moved in arrest of judgment, that he has set forth the custom, but has not declared on an express promise; and he argued

Declaration against drawer is good without laying an express promise. 1 Vent. 27, 44, 152, 153. 1 Lev. 280. 1 Mod. 14. Cro. Jac. 44. Cu. ber. 32. Carth. 500. S. C. Bailey 11. St. 224.

that it is not enough to set forth a contract for goods, *ratione cuius* the defendant became indebted, &c. nor a submission to an award, *ratione*, &c. And that without alleging an express promise, it must be taken for a mere action of deceit upon the warranty, to which the proper answer is *non cul.* and then it cannot be joined with the *indebitatus assumpsit* and *quantum meruit*. *Vide Hard. 486. Hob. 180. 2 Keb. 695. Win. 24. 1 Cro. 302, 1 Ro. 302. 2 Cro. 306. 2 Ro. 366. 1 Keb. 878. 1 Sid. 160. Northey* answered, that it was sufficient to count upon the custom, because the custom makes both the obligation and the promise. And *Holt* Chief Justice held the drawing of the bill was an actual promise; and judgment was given *pro quer.*

[129]

11. *Mitford versus Wallicot.*

[12 Will. 3. B. R. Comyns 75. S. C. by the name of Gregory v. Walcup, 1 Ld. Raym. 574. S. C.]

Acceptance after the time of payment elapsed is good, and amounts to a promise to pay the money generally. Ante 127. Cases B. R. 410. S. C.

THE plaintiff declared on a bill of exchange dated the 28th of *October*, payable at double usance; and that the defendant on whom it was drawn accepted the same the 31st of *December*, and promised to pay *secundum tenorem billæ præd.* And it was objected in arrest of judgment after verdict, that there could be no acceptance to pay *secundum tenorem billæ*; because the time of payment was elapsed at the time of the acceptance: *Sed non allocatur.* For if, after the time of payment is elapsed, *H.* accepts the bill, the acceptance is good; and the substance of the promise is to pay the money. *Judicium pro quer.*

12. *Clerk versus Martin.*

[Pas. 1 Ann. B. R. 2 Ld. Raym. 757. S. C.]

Post 364. Action lay not on a promissory note before the statute. Ante 125. 5 Mod. 13. 6 Mod. 29.

A Note was given by the defendant, whereby he promised to pay to the plaintiff, or order, so much money. The plaintiff brought an action on this note, and declared on the custom of merchants; and likewise laid a general *indebitatus assumpsit*, and on the general issue entire damages were given. Upon motion in arrest of judgment, the Court held, that this is not within the custom of merchants, and, being no specialty, no action can be grounded on it. Then it was answered, that being void, no damages could be intended to be given for it. *Sed non allocatur*; for it is not a matter insensible, but insufficient in law. And judgment was arrested. *Vide infra.*

13. Pottet *versus* Pearson.

[Pas. 1 Ann. B. R. 2 Ld. Raym. 759. S. C.]

ERROR of a judgment in the Common Pleas on a like note; the plaintiff declared, that there was a custom within *London* among merchants trading there, that if a merchant signed a note, promising to pay to J. S. or order, &c. that he became bound by the custom to pay, &c. And *A. Clerley* would have distinguished this from the foregoing case, being laid as a special custom in *London*, and that confessed by the judgment by *nil dicit*. *Sed per Holt C. J.* This custom to oblige one to pay by note without consideration is void and against law. *Ex nudo pacto non oritur actio*. The judgment was reversed. Post 364. Ann. 125.

14. East *versus* Effington.

[130]

[Mich. 1 Ann. B. R. 2 Ld. Raym. 810. S. C. *quod vide*.]

INDORSEE declared on a bill of exchange against the drawer, and the bill was, *Pray, pay this my first bill of exchange, my second and third not being paid*; and the indorsement was set out in this manner, that the drawer *indorsavit super bi. lam illam, content. billæ illius solvend.* to the plaintiff, without shewing that it was subscribed. On *non assumpsit* and verdict *pro quer.* it was objected in arrest of judgment, that there was no averment that the second and third bill was not paid, which is a condition precedent: *Sed non allocatur, Et per Cur.* That must be intended, for the plaintiff could not otherwise have had a verdict: and for the same reason also, the indorsement, which was likewise excepted against as set forth in the declaration, was held good, being aided by the verdict; the Court comparing it to an action of debt, by an assignee of a reversion, without shewing an attornment, which on *non debet* is aided by verdict; for if the indorsement be necessary to transfer the bill, so is the attornment to pass the reversion. *Ergo*, as the attornment shall be supplied by the jury's finding *debet*, so shall the indorsement by their finding *assumpsit* (a). Far. 86. In declaration on a first bill, want of averment, that the second and third were not paid, aided after verdict. 3 Salk. 400. S. C. VI. Str. 224.

(a) *R.* on judgment by default, that an averment that second and third were not paid, was not material; *Slacke v. Chessman, Carth. 509.* And on demurrer to the replication; *Wegger v. Kasse, Str. 214.*

1 Vent. 105,
27, 44, 151.
1 Lut. 890.
1 Sid. 428.
1 Mod. 14. Far.
87. Post 365.

15. *Lucas versus Haynes.*

[Pas. 2 Ann. B. R. 2 Ld. Raym. 871. S. C.]

Indorsement of
the name only
does not transfer
the property.

Ante 126.

IN trover for a bill of exchange, the case upon evidence was, That the plaintiff had a bill of exchange drawn upon the defendant, and sent it by J. S. to the defendant to get it accepted. J. S. left it with the defendant; and afterwards the bill being lost, the plaintiff brought trover for it, and J. S. was now the plaintiff's witness for this matter; and because the plaintiff had indorsed the bill, it was objected that J. S. could not be a witness; and this point being saved, the Court were all of opinion, that the bare indorsement, without other words purporting an assignment, does not work an alteration of the property; for it may still be filled up, either with a receipt or an assignment, and consequently J. S. is a good witness.

16. *Butler versus Crips.*

[Trin. 2 Ann. B. R.]

Bill payable to
me or order.
6 Mod. 29. S. C.
by name of But-
ler ver. Crips.
Holt 119.
30 Mod. 286.

PER Holt C. J. *Pay to me or my order so much*, is a bill of exchange, if accepted, and this is the only way to make a bill of exchange without the intervention of a third person.

[131]

17. *Borough versus Perkins.*

[Mich. 2 Ann. B. R. 2 Ld. Raym. 992. S. C. by the name of Brough and Parkings.]

In declaring up-
on inland bills
against the draw-
er, protest need
not be set forth.
9 W. 40p. 17.
6 Mod. 89. S. C.

Holt 122.

Ante 127.

1 Lill. 134.

Mod. Ca. 29.

ERROR of a judgment in *C. B.* in case on an inland bill of exchange brought against the drawer, and judgment for the plaintiff by *nil dicit*. Mr. *Raymond* for the plaintiff in error urged, that it doth not appear by the declaration that the bill was protested, and since the statute 9 & 10 W. 3. no action lies against the drawer unless there be a protest made as that act requires, and this ought to appear in the declaration; for at common law the party had no remedy against the drawer, without notice first given him of non-payment: and if the statute does not make the protest necessary, it does nothing. Mr. *Parker contra*. It does not appear the bill was accepted by under-writing, without which it is not within the statute, and without it a protest cannot be made; for a protest was not necessary at common law in case of inland bills,

as it was in case of foreign bills; but supposing it were within the statute, yet the protest need not be set forth in the declaration, but this is to be considered at the trial; for if the drawer receive damage for want of a protest, and the damage amounted to the value, it is a total discharge; if less, yet for so much. *Holt* C. J. In inland as well as foreign bills of exchange, the person to whom it is payable must give convenient notice of non-payment to the drawer; for if by his delay the drawer receive prejudice, the plaintiff shall recover: A protest on a foreign bill was part of its constitution (a); on inland bills, a protest is necessary by this statute, but was not at common law; but the statute does not take away the plaintiff's action for want of a protest, nor does it make such want a bar to the plaintiff's action: but this statute seems only, in case there be no protest, to deprive the plaintiff of damages or interest, and to give the drawer a remedy against him for damages if he makes no protest. *Quod Powel concessit*, and that a protest was never set forth in any declaration since the statute.

Mod. Cases 80,
81. S. C.
Brough vers.
Perkins.

Protest was not
necessary to
charge the draw-
er of inland bills
at common law.

VI. Str. 910.

(a) *R.* that the protest of a foreign bill must be proved; 5 *T. R.* 239. It ought to be stated; *Bailey* 683; or shewn not to be necessary; 2 *T. R.* 713. But the omission can only be taken advantage of upon general demurrer; *Salomons* and *Stavely*, *Doug.* 683. 3d edit. note † 144.

18. Buckley versus Cambell.

[Hill. 7 Ann. B. R.]

THE plaintiff declared upon a bill of exchange drawn at *Amsterdam*, payable at *London* at two usances, and did not shew what the two usances were; and judgment was given *pro def.* for the Court could not take notice of foreign usances which varied, being longer in one place than another (a).

Usance; the
time must be
averred.

(a) *Mr. Bailey*, in his Treatise on Bills of Exchange, page 59, makes a *quere* on this point, where there is an express averment that the bill was pre-
sented on the day it became payable, the omission is only fatal on demurrer; 3 *Keb.* 645.

19. Hill & al. versus Lewis.

[132]

[*Q. If Taffell and Lee v. Lewis*, 1 *Ld. Raym.* 743, is not S. C.]

ACTION upon the case for 170 *l.* 10 *s.* The plaintiff declared several ways, *viz.* 1st, Upon two bills of exchange against the indorser. 2dly, Upon a *mutuatus*. 3dly,

H. indorsed two
notes in satisfaction
of a debt,
and before re-

ceipt the drawer broke. *Quere*, Whether the indorser could be charged? *Mod. Cases* 37. *Skin.* 420. *S. C. Holt* 116. See 6 *Mod.* 137. 2 *Stran.* 1175. *Comyns* 57.

3dly, An *indebitatus assumpsit* for money laid out for the use of the defendant. Upon *non assumpsit* pleaded, the case upon evidence was, *Moor* a goldsmith subscribed two notes payable to the defendant; the defendant on the 19th of *October* indorses these two notes, and gives them and eight others to one *Zouch*, to whom he was indebted: *Zouch*, the 19th of *October*, betwixt the hours of eleven and twelve, brought these notes to the plaintiffs, being goldsmiths, and they accepted them, and gave to *Zouch* other bills, and some money; and afterwards, the same day, the plaintiffs received money upon other bills of the said *Moor*, and might have had the money due upon these two bills, if they had been demanded; but in the night following, about midnight, *Moor* broke and ran away; and whether the plaintiffs or indorser should lose this 170 *l.* 10 *s.* was the question.

And the first question was, Whether the acceptance of these bills in satisfaction for so much money, be a good discharge of the indorser? And *Holt C. J.* held, that goldsmiths bills were governed by the same laws and customs as other bills of exchange; and every indorsement is a new bill, and so long as a bill is in agitation, and such indorsements are made, all the indorsers and every of them are liable as a new drawer. That by the law generally, every indorser is always liable as the first drawer, and cannot be discharged without an actual payment, and is not discharged by the acceptance of the bill by the indorsee; but by the custom this is restrained, *viz.* the acceptance is intended to be upon this agreement, *sc.* That the indorsee will receive it of the first drawer (a), if he can, and if he cannot, then that the indorser will answer it; as if the first drawer be insolvent at the time of the indorsement, or upon demand refuses to pay it, or cannot be found. And the indorser is not discharged without actual payment, until there is some neglect or default in the indorsee, as if he does not endeavour to receive it in convenient time, and then the first drawer becomes insolvent.

The second point was, What shall be thought convenient time to endeavour to receive such bill? *Et per Holt C. J.* In case of foreign bills, he upon whom it is drawn hath three days to pay it, and the indorsee of such foreign bill need not demand payment until the said three days be expired; and if he upon whom the bill is drawn become insolvent in the said time, the indorser is chargeable, and after the three days the indorsee may protest it; and it seems the same time ought to be allowed for inland bills, though it was urged that for foreign bills a longer time

Post pl. 20. By custom the indorser is only liable in default of the first drawer. 1 *Willson* 47.

Ante 126, 128. *Post* 133, 442.

Indorsee must have convenient time to demand it.

[133]

(a) *Vide* note to *Anon.* p. 126. pl. 6.

was

was required, in respect the drawee was to receive advice from the drawer (a).

And the Chief Justice, in his direction to the jury, said, That what should be thought convenient time, ought to be according to the usage among traders in such cases, and upon all the circumstances. That the plaintiffs had ten bills delivered to them together; and that perhaps they had other affairs that hindered them from going presently to receive these two bills, and that they received two other bills the same day. The Chief Justice left it to the jury to consider, whether the time in this case were convenient time or not (b): And if the plaintiff had convenient time to receive his money, then to find for the defendant, otherwise for the plaintiff. And they upon consideration found for the plaintiff; upon which the plaintiff prayed to take the verdict upon the *indebitatus assumpsit*. *Et per Chief*

Convenient time is according to the usage of traders, and circumstances of particular cases.

(a) Days of grace are allowed on inland bills. R. that they are allowed on promissory notes; 4 T. R. 148. If the third day is a day of public rest, the bill is payable on the second; *Ld. Raym.* 743.

(b) The following note upon this subject is extracted from Mr. Bailey's *Treatise on Bills*, p. 32.

"What shall be considered as reasonable time (1) is matter of law, and will depend upon the occasion upon which the bill or note was given.

"Thus upon such a bill or note given for cash, by a person who makes the profit by the money on such bills or notes a source of his livelihood, it is difficult to say what length of time is to be considered unreasonable; while upon such bills or notes given by way of payment, or paid into a banker's any time beyond that which the common course of business warrants (2), is.

"Upon a bill or note of this kind, given by way of payment, the course of business seemed formerly to be to allow the person to keep it, if it was payable in the place where it was

given, until the (3) morning of the next day of business after its receipt, and till the next post if payable elsewhere (4), but not longer.

"Thus, upon a note of this kind, payable in *London*, and given there in the morning, a presentment the next morning was held sufficiently early (5); the presentment of a similar note given in *London* at half past eleven on the *Monday*, at two on the *Tuesday*, too late (6).

"But in a very modern case, deferring the presentment of a similar note given in *London* at one, until the next morning, was held unreasonable (7).

"And in all cases the presentment ought, it should seem, to be made the first time the holder goes or sends upon business to the person who is to make the payment.

"A bill or note of this kind, given by way of payment to a banker, must be presented by him as soon as if it had been paid into his house by a customer; which, if payable at the place where the banker lives, must be the next time his clerk goes his rounds (8)."

(1) *Appleton v. Sweetapple*, B. R. M. 23 G. 3. Append to Bailey, No. 6.

(2) *Vi Str.* 416. (3) *Vi. Fletcher v. Sandys*, *Str.* 1248. *Ward v. Evans*, *Ld. Raym.* 928. (2 *Salk.* 442.) *Moore v. Warren*, *Str.* 415. *Turner v. Mead*, *Str.* 416. *Moore v. Da Costa*, *Str.* 910. (4) *Vi. Manwaring v. Harrison*, *Str.* 508. *E. I. Comp. v. Chitty*, *Str.* 1175. (5) *Hill v. Lewis*, *supra*. (6) *E. I. Comp. v. Chitty*, *Str.* 1175. (7) *Appleton v. Sweetapple*, Appendix to Bailey, No. 6. (8) *Hankey v. Trotman*, *Bl.* 1.

Verdict may be taken upon any part of the declaration, to which the evidence is applicable.

Justice, You cannot take the verdict upon any part of the declaration but that to which evidence was given, and here it will be good, if found upon the bills of exchange; but if the evidence be applicable to any other part of the declaration, you may take it upon any such part to which the evidence is applicable. And because *Zouch* had sworn that he received the benefit of, and had been satisfied with the bill he took of the plaintiff, by which the defendant was discharged against *Zouch*, the verdict was taken upon the *indebitatus assumpsit* for money laid out for the defendant's use; and it seemeth the indorsement by the defendant to the plaintiff was good evidence of a request to pay the said money to *Zouch*. Now exception was taken that one bill was payable to the defendant only, without the words, *or his order*, and therefore not assignable by the indorsement; and the Chief Justice did agree that the indorsement of this bill did not make him that drew the bill chargeable to the indorsee; for the words, *or to his order*, give authority to the plaintiff to assign it by indorsement; and it is an agreement by the first drawer that he would answer it to the assignee: But the indorsement of a bill which has not the words, *or to his order*, is good, or of the same effect betwixt the indorser and the indorsee, to make the indorser chargeable to the indorsee (a).

Ante 125. Assignment of note not payable to order, charges the indorser, not the drawer.

(a) *Vide Bailey 17.*

20. *Harry verſus Perrit.*

[Trin. 9 Ann. B. R.]

Indorser charges himself in the same manner as the drawer. Ante 126, pl. 6.

ACTION on a promissory note against the second indorser, and the plaintiff declared without an averment, that the money was demanded of the drawer, or the first indorser. And this was held good upon motion in arrest of judgment; for the indorser charges himself in the same manner as if he had originally drawn the bill (b).

(b) *Vi. accord. Bromley v. Frazer, Atk. 281. Heylin v. Adamson, 2 Burr. 1 Strange 441. Lake v. Hayes, 1st 669.*

Bishops, Archbishops, &c.

Bishop of St. David's *versus* Lucy,

[Pas. 11 W. 3. B. R. 1 Ld. Raym. 447. 539. S. C.]

THE Bishop of St. David's was sued in a court held at *Lambeth*, before the Archbishop of *Canterbury* himself in person, for simony, and several other offences; and now he moved for a prohibition; and the suggestion was, that he was cited to *Lambeth*, and not to the *Arches*, and also that he was cited before the archbishop himself, and not before his vicar-general, and the proceeding against him was in order to a deprivation. *Et per Curiam*,

1st, The archbishop hath a provincial power over all the bishops of his province, and may hold his court where he pleases; and he may convene before himself, and sit judge himself; and so may any other bishop; for the power of a chancellor or vicar general is only delegated in case of the bishop.

2dly, The Court held, that the spiritual court might proceed to punish him for any offence done against the duty of his office as bishop, and as it relates to that: for ecclesiastical persons are subject to the canons; those of 1640 have been questioned, but no doubt was ever made as to those of 1603. And as the clergy are under different rules and duties, it is but reasonable that if an ecclesiastical person offend in his ecclesiastical duty, he should be punishable for it in the ecclesiastical court, especially if it be in a matter for which he is not punishable at common law; and it is but fit the clergy should have a power to purge their own body from scandalous members. *Carw-dry's* case was remarkable, for he was deprived for preaching against the common prayer; and yet being the first instance, there was another punishment appointed by the statute. *Vide* 31 E. 3. c. 4. 2 Inst. 586. The ecclesiastical court may punish any ecclesiastical officer for extortion. They may punish for forging of orders, *vide* *Keb.* 39. They may punish perjury committed in a spiritual court, and a spiritual matter, as matrimony; not in a temporal matter, as in contracts, (but this is not settled, *per Holt*,) *vide* 3 Cro. 788. Simony is determinable in the spiritual court, and not here; for it was not supposed at common

12 Mod. 238.
Ante 106. Post
294. Bishop
cited before the
archbishop in
person, for simo-
ny. Mod Cases,
&c. 160. Far.
56.

Bishop may
judge in person
or by vicar gene-
ral.

Bishop may be
punished in the
archbishop's
court for any
offence against
the duty of his
office.

Rep. Br. temp.
Hard. 334.

5 Co. 6.

Ecclesiastical
court may pu-
nish a temporal
offence, if com-
mitted in an ec-
clesiastical court,
or matter.

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common law, which is the reason there were no damages in a *quare impedit*. *Vide* 4 Co. 49. b. 3 *Inst.* 204. Bishop deprived for dilapidations.

A prohibition being denied, the archbishop went on and gave sentence of deprivation against the bishop of St. David's: Upon this the bishop of St. David's appealed to the delegates; and in *Mich.* 11 *W.* 3. suggesting that by the common law the archbishop alone could not deprive a bishop, and that the delegates refused to admit his allegations, he moved for a prohibition, urging, that all bishops were barons, and *inter se* peers. *Et quod par in parem imperium non habet*. And that though a bishop may be censured, yet he cannot be deprived by an archbishop, because their temporalities, which are protected by common law, are concerned; *vide* 14 *E.* 3. c. 3. But it ought to be done by convocation, [which *Holt* C. J. said was a new fancy of Sir *Bartholomew Shower's*,] or by the ecclesiastical commission.

Mich. 11 *W.* 3.

Bishops are pares jure divino, not humano.

Archbishop has a metropolitical jurisdiction over bishops by common law;

Usurped by the pope; but restored by the statute of H. 8. He that can visit, can deprive.

Upon issue, whether parson be deprived, Court must write to the bishop; whether

Hereupon *Holt* C. J. and the rest held, an archbishop had power over his suffragans, and might deprive them; that bishops are co-ordinate, or *pares jure divino*, but not *jure humano*, otherwise their institution would be to no end. That their peerage is by reason of their barony; that several abbots sat in the House of Lords in former times, and it might as well be pretended that they were therefore exempt from the bishop and could not be deprived. That by the common law the archbishop has a metropolitical jurisdiction; and that archbishops are over bishops, as well as bishops are over the other clergy; that his power was usurped upon and diminished by the pope, but restored to its extent at common law by the statute of *H.* 8. That by allowing his power to visit, all is admitted; for he that may visit may deprive as well as censure, these being but several degrees of ecclesiastical punishment; and by the 26 *H.* 8. and the 1 *Eliz.* c. 1. the only power given to the ecclesiastical commissioners was to visit without a word of deprivation; yet they were always allowed a power to deprive. From the time of *H.* 2. till *H.* 8. there hardly is an instance of the deprivation of a bishop. And it is true, that before the 17 *Car.* 1. c. 11. confirmed by 13 *Car.* 2. c. 12. which takes away the court of high commission instituted by 1 *Eliz.* those deprivations that are of bishops, are by the court of ecclesiastical commissioners; yet the reason of that was only because it was the easier and shorter way. That it is not to be questioned but a bishop may be deprived, *vide* 11 Co. 49. he may be deprived for dilapidations. And it is as plain that the law takes notice of no other power that regularly can deprive him; for if issue be whether a parson be deprived or not, the Court must write to the bishop; and if issue be whether

then a bishop be deprived or not, this Court must write to his archbishop to certify; and to what purpose should the 23 H. 8. c. 9. against citing out of the diocese, save the power of the archbishop over his bishops, if he had no power: *vide* to the same purpose 29 Car. 2. c. 9. 13 Car. 2. c. 11. The prohibition was denied, and ordered that the suggestion be entered on record, that the Court might enter their reasons of denial. *Et per Holt C. J.* If it be insisted on, a prohibition cannot be moved for till the suggestion be entered on a roll. Afterwards *Holt C. J.* said, that the bishop of St. David's moved the House of Lords for a writ of error upon this denial of a prohibition, and it was there held no writ of error lay.

bishop be deprived, to the archbishop.

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Strictly prohibition cannot be moved for, till suggestion entered on the roll.

“Bishoprics in *England* were anciently donative by the king, and with good reason, for the king was patron; he endowed them with their lands and baronies, and then the ceremony was investiture *per annulum & baculum*, the one a symbol of the spiritual marriage with the church, the other of the pastoral care and charge over Christ's flock. After many scuffles between the popes and kings of *England*, it was settled at last in king *John's* time, first, That the king should suffer a free election, but that that should be founded on his *consent d'eslire*. And, 2dly, That the bishop should not have his temporalities till he swore allegiance to the king; but that confirmation and consecration should belong unto the pope; by which means he gained in effect the disposal of bishoprics, till 25 H. 8. which takes away the papal jurisdiction, *quod vide*. Afterwards, by the 1 E. 6. c. 1. all bishoprics were made donative; but the 8 Eliz. c. 2. has restored the statute of the 25 H. 8. and thereby hath made them elective in *England*; but in *Ireland* they are donative by letters patent at this day. Note, By the council of *Lateran*, and the decrees of *Alexander 3.*, no man was to take a benefice from lay-hands, *per Witlock, Widdrington 69.* b. *per Doderidge*, That the original letter of agreement is to be found in *Matthew Paris* and *Eadmerus*. *Vide* 1 Jones 160. Lat. 37, 233. Palm. 457.

Anciently bishoprics were donative by the king. Conferred by investiture. Co. Lit. 344. a.

“The manner of making a bishop, as well in case of translation as new creation, is thus: When a bishop dies, the dean and chapter certify the king in chancery, and pray his licence to elect; upon this the king gives his *consent d'eslire*, upon which they elect, and then certify the king, archbishop, and party; and then the king by his letters patent gives his royal assent, and commands the archbishop to confirm and consecrate him; whereupon the archbishop examines the election and the party, and then confirms the election and consecration himself. This is the manner of proceeding in crea-

Manner of creating and translating bishops.

Consecration and
confirmation,
not election,
makes former
presentments void.

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Requisites to
complete a bi-
shop.

Translation an-
ciently was by
postulation to
the pope.

" tions, and it holds likewise in case of translation, save
" only that he is not consecrated, for a consecration is like
" an ordination, *character indelibilis*, and suffices for ever.
" See 1 *Jones* 100.

" " When a bishop is translated, the old see is not void
" by the election, till that election is confirmed: for
" though he be elected, the king may not consent, nor the
" archbishop confirm; and it is * not reasonable they
" should lose their old presentment till they gain the new.
" 1 *Jones* 162.

" " And in case of creation, not till consecration. *Per*
" *Doderidge; Widdrington* 6. b.

" " As there are four things required to complete a par-
" son, *sc.* presentation, admission, institution, and induc-
" tion; so there are four things analogically requisite in
" a making of a bishop; election, which resembles presen-
" tation; confirmation, which resembles admission; con-
" secration, which resembles institution; and installa-
" tion or inthronization, as in the case of an archbishop,
" which resembles induction. *Per Doderidge; Widdrington* 69. b.

" " Heretofore, when a bishop was to be translated, there
" was no election, for the rule of the canon law was, *elec-
" tus non potest eligi*; and because it was pretended he was
" married to the first church, which marriage could not
" be dissolved but by the pope, thereupon petition was
" made to the pope, and upon the pope's consent the
" party was translated; this was said to be by postula-
" tion. *Vide Widdr. 48. b. Sed per Cur.* This was an
" usurpation and against law, and restrained by 16 R. 2.
" and 9 H. 4. c. 8., and translations are ever by election,
" and not by postulation. 1 *Jones* 160."

Breach ^(a) in Actions of Debt, Covenant, Case, &c.

1. Coleman *versus* Sherwin.

[Mich. 1 W. & M. B. R.]

IN *covenant*, the plaintiff declared, that the defendant and one J. S. demised to the plaintiff for seven years, *virtute cuius* he entered and was possessed; and the defendant and one A. by his command, entered upon the plaintiff; and that neither the defendant nor the said J. S. had or ought to have demised the premises, but at the time of the demise, one R. was seized in fee; the defendant pleaded that J. S. was seized, and had power and right to demise, *absque hoc* that R. was seized, &c. And *absque hoc* that the defendant entered and kept him out; the plaintiff demurred. *Et per Cur.* 1st, There being no express covenant, the action is founded upon the covenant in law implied in the word *dimiserunt*; and therefore as the interest granted by that word is joint, so is the covenant imported by it: And then the action as to this breach of their being not seized at the time of the demise, ought to have been against both the lessors, and cannot be maintained against the defendant alone: But as to the other breach, *viz.* That the defendant and one A. entered, the action is well enough brought against him only; for it is his own act, and in construction each did demise, and it is a several covenant as to their own acts subsequent. 2dly, The Court held, that as the plaintiff might well assign several breaches, the defendant might as well pursue and traverse them; but judgment was given for the defendant, because the action was not against both the lessors, and the plea was good. *Vide Show. 79. Mesme Case (b).*

SHOW. 79. A. and B. Dimiserunt imports a joint covenant as to the interest granted. Co. Entr. 111, 112. Carth. 97. Comb. 163. 1 Roll. Abr. 520. Hob. 12. Noy 86.

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But several as to subsequent acts. Where plaintiff assigns several breaches, defendant may traverse severally.

(a) *Knight v. Cambridge*, 3 Lord Raym. 1349. 8 Mod. 230. Str. 581. A breach assigned in the words of the covenant is good, but it is equally good to assign the breach in words tantamount. *Vide Fergusen v. Cornish*, 3 Burr. 1032. *Stibbs v. Clough*, Str.

217. *Innholders case*, 1 Wilf. 281. *Simmons v. Langborne*, 2 Wilf. 11. *Cornwallis v. Savery*, 2 Burr. 772. *Duffield v. Scott*, 3 Term Rep. 34. *Com. Dig. Pleader, C. 45, 46, 47, 48.* (b) *Vide Str. 553, 1146.*

Meredith *versus* Alleyn.

[Pas. 2 W. & M. B. R. Intr. Hill. 1 W. & M. Rot. 20.]

Carth. 115.
Where defendant pleads matter of excuse that admits a non-performance, plaintiff need not assign a breach in his replication. Hob. 14. 1 Sid. 180, 186, 290. Hob. 198, 199, 233. Yelv. 78. 3 Lev. 17, 23, 24. 1 Saund. 102. 1 Show. 148. S. C. Holt 544. Cro. Fliz. 320, 399. Yelv. 25.

Reason of the difference in debt upon bond to perform award. Yelv. 24, 25, 78, 79. 3 Cro. 320. 1 Lev. 54, 55. 3 Lev. 17. 2 Willson 293.

DEBT upon a bottomree bond; defendant craved *oyer*, and the condition was, that if such a ship returned within ten weeks, and gave an account of the profits, then, &c. The defendant pleaded, that the ship was lost, and did not return; the plaintiff replied, the ship was not lost, *et hoc petit quod inquiretur per patriam*. The defendant demurred, and shewed for cause, that no breach was assigned in the replication; *Showers* argued for the defendant, that without a breach, the plaintiff had no cause of action, and the condition, by craving *oyer*, is become part of the record. And he relied upon 1 *Saund.* 102. But the Court gave judgment in this case for the plaintiff. *Et per Holt C. J.* In all cases (that of a bond to perform an award excepted) if the defendant pleads a special matter, that admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a non-performance, supposes it (a); and the plaintiff need not shew that which the defendant has supposed and admitted (b). But if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach; for then he has not a cause of action unless he shew one. The reason of that case of the award is single; it is because, though an award be made, yet it may be void in whole or in part: and therefore the plaintiff must not only shew the award, that the Court may see that there was an award, but must also set forth the breach, that it may appear likewise that the non-performance was of a good part of the award, and not of a void part thereof; for in that it need not be performed. 2 *Cro.* 472. But if the defendant pleads *non submisit*, and so forces the plaintiff to issue, there need be no breach set out. 1 *Sid.* 290.

(a) *R. acc. Leckey v. Darby*, 1 *Ld. Raym.* 108.

(b) *R. acc.* 1 *Lev.* 55. *Str.* 297.

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3. *Stagg versus Hind.*

[Trin. 6 W. & M. B. R.]

Breach, that 3 l. for a year at Lady-day last was arrears, &c. well,

IN *covenant* the plaintiff declared, That the defendant covenanted to pay yearly, during the plaintiff's life, at the two feasts of *Michaelmas* and *Lady-day*, 3 l. 6 s. 8 d. by equal

equal portions, and for breach assigned, that 3 *l.* 6 *s.* 8 *d.* on general demurrer. Show. 9^o. for a year at *Lady-day* last, was arrear and unpaid. The defendant demurred, and objected, that it does not appear when the money became due; for it might be behind and unpaid at *Lady-day*, and yet might become due at *Michaelmas*, or the *Lady-day* before. But the Court held this well enough upon a general demurrer, and gave judgment *pro quer.*

4. Smith *versus* Sharp.

[Mich. 7 W. 3. B. R.]

DEBT for 500 *l.* upon articles in *C. B.* and judgment by *nil dicit.* A writ of error was brought in *B. R.* It was assigned for error, that whereas the defendant was to tender a conveyance to the plaintiff, his heirs or assigns, the breach assigned was, that the defendant had not tendered a conveyance to the plaintiff, and so not pursuant to the covenant by which he is to tender to the plaintiff or his assigns. *Vide 3 Cro. 348. accord. Sed per Cur.* The difference is between doing a thing to a man or his assigns, and by a man or his assigns; if a thing be to be done by a man or his assigns, the breach must be in the disjunctive, that it was not done by him or his assigns. But where a thing is to be done to a man or his assigns, it is sufficient to assign for breach, it was not done to him; for an assignment should be intended to be done to the plaintiff himself, and if he assign his interest, then to the assignee; and if he did assign over his interest, that ought to be shewed on the other side. Judgment affirmed (*a*).

5 Mod. 133.
Agreement to convey to H. or his assigns.
Breach that he did not convey to H. good.
Cates B. R. 86.
S. C. Diversity between covenant to do an act to, or by H. or his assigns.
1 Lutw. 571.
3 Keo. 440.

Vi. Str. 228.
Bull. N. P. 164.

(*a*) *Gyse v. Ellis*, 1 Str. 228. Covenant that the defendant, his heirs or assigns, should yearly, during the term, plant eight trees. Breach that the defendant neglected to do so [without adding "his assigns"] held well alleged.

5. Farrow *versus* Chevalier.

[Trin. 11 W. 3. B. R. 1 Ld Raym. 478. S. C.]

COVENANT by the master against his servant, on a covenant not to buy or sell without the master's leave within two years; and breach assigned that he had, *diversis diebus & vicibus*, between such a day and such a day, sold to H. and to several other persons unknown, goods to the value of 100 *l.* Issue was upon this, and verdict for the plaintiff, and moved in arrest of judgment,

Covenant not to buy or sell within two years.
Breach, that diversis diebus & vicibus, between such a day and such a day, he sold to H. and

Several other persons; held well. Holt 176. S. C. Diversity. 1 Lev. 94. Cro. Jac. 486. Cro. Car. 176. 1 Brownl. 23. 2 Mod. 176. 2 Jon. 125. * [140] 3 Mod. 69. Vi. Ld. Raym. 106.

that the breach was uncertain as to times and persons; cases cited *pro & con.* 3 Cro. 916. 2 Cro. 567. * Ray. 8; 9, 10. Sty. 420, 428. *Et per* Holt C. J. In debt on a bond to perform covenants, the replication must shew a certain breach; but in covenant it is enough to assign a general breach. And this is certain enough; for it is so described, that if another action be brought, the defendant may plead a former recovery for the same cause, and aver this to be the same selling. Gould J. agreed and said, That in debt for a penalty on a statute, it is not enough to assign a breach in this manner, because every offence entitles to a distinct penalty (a); but here the action being only for damages, it is well enough. Judgment *pro quer.*

(a) *Vide* Ld. Raym. 581.

6. Harmon *versus* Owden.

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 620. Comyns 89. 12 Mod. 421. S. C.]

Assumpsit to deliver corn upon or before the fifth of January, into a barge, to be brought by the plaintiff. Breach that he did not deliver upon the fifth of January, is good. Holt 127. S. C.

3 Lev. 293.
2 Vent. 221.

Vide 2 Keb. 411.

2 Saund. 350.
Cro. Car. 497.

CASE, for that the defendant, in consideration of 20 l. promised to deliver, on or before the fifth of January, twenty quarters of corn out of a ship into a barge, to be brought by the plaintiff to receive the said corn, and assigns for breach, That the defendant *non deliberavit* the said twenty quarters *super dictum quintum diem Januarii*. Defendant pleaded *non assumpsit*, and verdict for the plaintiff. It was moved in arrest of judgment, that the defendant might have delivered the twenty quarters before the fifth of January. After debate it was held, *per* Holt C. J. upon great consideration, 1st, That this was good without the verdict, for the barge was to be brought by the plaintiff, and the defendant was to deliver the corn into that barge, so there must be a concurrence of both parties. The defendant could not make a tender to oblige the plaintiff to accept before the last day; and therefore since the last day is the time appointed, when the one is obliged to deliver, and the other to accept, it shall not be presumed. that the plaintiff was there before the time, ready to accept the corn with his barge. *Vide* 3 Cro. 14, 73. (a). 2dly, That it was clearly helped by the verdict; because if there had been an actual delivery, it might have been given in evidence upon *non assumpsit*, and then the jury could not have found for the plaintiff (b). *Vide* 1 Sid. 15, 1 Saund. 228. 1 Vent. 119. Judgment *pro quer.*

(a) *Vi.* Cro. Jac. 499. pl. 8. Co. (b) *Vi.* Gilb. C. B. 65. Bl. 389. Lit. 202. Com. Di. Rem. D. 7. 3 ed. Str. 521. vol. 6. pa. 221.

N. B.

N. B. As to the 1st point, *Holt C. J.* said, There was no occasion to deliver his opinion as to that, since the second point made an end of this case. But he said, if such a case did happen, he believed, he would not be positive, that such a declaration would be good; so they gave no absolute opinion as to that.

7. *Tompkins versus Pincet.*

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[Mich. 1 Ann. 2 Ld. Raym. 819. S. C.]

DEBT for rent; the plaintiff declared upon a demise made the 25th of *August 11 W. 3.* of a messuage, *habendum* for seven years, *incipiend. a 24 die Januarii, reddendum* quarterly at the four most usual feasts in the year, *scilicet Michaelmas, St. Thomas, Lady-day, and Midsummer*, the rent of 3 *l. 10 s. per annum*; the first payment to be made at *Michaelmas* next; and shews that 14 *l. de redditu prædicto pro uno anno finito 24 Decembris anno 13 W. 3. aretro fuerunt, &c. Undi assio, &c.* The defendant demurred. Mr. *Mompesson* took this exception to the declaration, that there is no year ending the 24th of *December*, but it ends at *St. Thomas's day*, according to the *reddendum*, which is the 21st of *December*; *quod Curia concessit*; for where special days of payment are limited by the *reddendum*, the rent must be computed according to the *reddendum*, and not according to the *habendum*; and the computation of the rent, according to the *habendum*, is only where the *reddendum* is general, *scilicet*, yielding and paying quarterly so much rent; upon which the plaintiff prayed leave to discontinue, and had it.

Far 96. S. C. It in a lease special days of payment are limited by the *reddendum*, the rent must be computed according to that, and not the *habendum*.

8. *Vivian versus Campion.*

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1125. S. C.]

THE plaintiff as heir declared; That his ancestor *per indenturam suam, cujus alteram partem sigillo* of the lessee (omitting *sigillat.*) *hic in curiam profert*, did demise; and that the lessee covenanted to *repair from time to time, and to leave in repair*; and then shewed that his ancestor died *anno 10 W. 3.* and for breach assigned *quod primo Apr. annotertio regine nunc, & per 10 annos ante tunc*, the premises were out of repair. After verdict for the plaintiff, it was moved in arrest of judgment, 1st, That the word *sigillat.* is wanting. 2dly, That part of the ten years incurred in the life of the ancestor, and that this was a hard action. *Et per Holt C. J.*

Heir assigns breach that the premises were out of repair, tali die & per 10 annos, which included his ancestor's time, held well *Holt 178. S. C. Vi. F. N. B. 343. Skin. 305. Espinasse 295.*

* 1 Vent. 109.
Far. 86.

1st, * The want of *figillat.* is cured by the verdict, and the pleading over. 2dly, If the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it is a damage to the heir; and the jury give as much in damages as will put the premises in repair; but hereby no damages are given in respect of the length of time they continued in decay, but in respect of what it will cost at the time of the action brought to put the premises in repair; therefore *per decem annos* was frivolous; and he said that this is not a hard action; and good damages are always given in these cases, because the damages recovered ought to be applied to the repair of the premises.

I. The City of London *versus* Yanacre.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 496. S. C. 12 Mod. 270. S. C.]

Carth. 480.
Franchise granted to a corporation may be regulated by by-law. 3 Mod. 158. 2 Lev. 252. 3 Lev. 273. 1 Lev. 15. 5 Mod. 438.
S. C. Cases
B R 269.
Holt 431.
3 Burr. 1833.

UPON a *habeas corpus*, the constitution of the city of London, as to the election of sheriffs, was returned, and also the custom for making by-laws; and that 7 Car. 1. a by-law was made, that no freeman of the city, chosen to be sheriff of London, shall be exempted from that office, unless he will take his oath that he is not worth 10,000 *l.*, and bring with him six persons as compurgators, such as shall be approved of; and that upon open proclamation made in *Guillball* of such choice, he being called to come and take upon him the office of sheriff at the next court, and enter into a bond of 1000 *l.* to take upon him the said office, upon default shall forfeit the sum of 400 *l.*, and if he does not pay that within three months, shall forfeit 400 *l.* more. Upon the motion for a *procedendo* it was objected, 1st, This is not within the custom for making by-laws, because the constitution of sheriff is by the charter of King James, which is within time of memory; *sed non allocatur*: For where a franchise is granted for the benefit of a body politic, the body politic has power incidently to regulate

T. Jones 145.
Morr 563.
Godb. 107.
Members are compellable to undergo officers of the corpora-

regulate that franchise for the public benefit (a). And this by-law is only to require substantial persons to undergo that office; and as every member has the benefit of the franchise, so they are compellable by penalties to undergo the charge and burdens to which the body politic is liable. Second objection, That the party elect may be indicted for refusal; *sed non allocatur*: For though he may be indicted and fined to the king, yet that will not save the city-franchise; therefore that shall not hinder the forfeiture on the by-law. Third objection, That the by-law does not provide that the party shall have any notice of his being elected, and the persons who are the subjects of the by-law are all the freemen; and it is not the freemen but the liverymen, who are to be present at the election. *Sed non allocatur*: For supposing that, yet the freemen are represented by the liverymen; and he that is represented must take notice as much of the act of the representative body, as if present; besides, the election is a notorious thing, and there is a proclamation notifying it.

don by by-law; even in cases where they may be indicted. He that is represented must take notice of the act of the body representative. Keilw. 116. 1 Roll. Abr. 443. Dyer 240. Allen 78. March 163, 187. Style 23, 224.

Cro. Car. 498. 1 Roll. Abr. 365. l. 20.

(a) *Vide Strange* 462. 1 *Bur.* 235.

2. Cuddon *versus* Eastwick.

[143]

[Hill. 2 Ann. B. R.]

A By-law, that all strangers coming into the port of *London* should employ city-porters to carry their goods, &c. was held nought. *Et per Cur.* They may make a by-law that none but freemen shall be porters (a); but to confine strangers to none but such as city-porters, is unreasonable: 1st, Because if the city will appoint no porters, they have no remedy against the city. And 2dly, Strangers cannot know who are city-porters, nor compel them to serve them. *Vide post*, title Corporation.

By-law, that all strangers shall employ city-porters ill. Post 192. S. C. 6 Mod. 123. Holt 433. 3 Mod. 193.

(a) *R. acc. Str.* 462, 469.

Carrier.

Lane *versus* Cotton.

[Pas. 12 Will. 3. B. R.]

Carrier liable in respect of his reward. Co. Lit. 29. a.

A Carrier is liable in respect of his reward, and not of the hundred's being answerable over to him; for the hundred is liable by the statute of *Winchester*, but he was so at common law; and the reason why robbery did not excuse him, was, because (a) it might be by consent and combination carried on in such a manner that no proof could be had of it. *Per Holt* Chief Justice.

(a) His responsibility extends to principle does not apply, as in case of fire. unavoidable losses, to which this principle. *Vide* 1 T. R. 27.

[144] Certiorari, Recordari. *Vide* title Habeas Corpus.

1. Rex *versus* North.

[Hill. 8 Will. 3. B. R.]

Certiorari not to be served after the jury sworn. 3 Sid. 317.
2 Keb. 138,
141, &c.
6 Mod. 17, 61,
62. 1 Sid. 296.
1 Mod. 43.

THE defendant was indicted before justices of the peace, and pleaded not guilty; and after the jury were gone out to consider of their verdict, he delivered in a *certiorari*; and the justices returned the verdict, and it was held well; for it cannot be delivered after the jury is sworn.

2. Anonymous.

[Pas. 9 Will. 3. B. R.]

A Motion was made for a *certiorari* to remove an indictment of barrettry, found at the sessions of gaol-delivery; and one *Nurse's* case was cited, wherein such a motion was granted. But *per Cur.* It is never granted to remove an indictment found before justices of gaol-delivery, without some special cause; so it is of the *Old Bailey*; and if such *certiorari* should be granted, and the cause suggested should afterwards appear false, a *procedendo* should be awarded (a).

Lies not to justices of gaol-delivery without special cause. Post 150, 151. Except for the king. Cro. Jac. 484. Poph. 144. 2 Rol. Rep. 28. Hob. 135.

(a) *R. acc. Str.* 583. *Ca. temp. Hard.* 369. *Vide Str.* 549, 1049, 1068.

3. Groenwelt versus Burwell.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 213, 454. S. C. on different points. Comyns 76. S. C.]

THE censors of the college of physicians have power by their charter, confirmed by act of parliament, to fine and imprison for mal-practice in physic; and accordingly they condemned Dr. *Groenwelt* for administering *insalubres pillulas & noxia medicamenta*, and fined and imprisoned him: And the question being, Whether error or *certiorari* lay? &c. it was held *per Holt* Chief Justice,

Post 200, 263, 396. *Certiorari* lies on a judgment given by the censors of the college of physicians for mal-practice. 1 Keb. 818. 2 Keb. 43, 129. 3 Mod. 94, &c. Cases B. R. 245. S. C. 3 Salk. 265. Carth. 421, 491. Holt 184, 395, 536.

1st, That error would not lie upon the judgment, because their proceeding is not according to the course of the common law, but without indictment or formal judgment: Yet,

2dly, That a *certiorari* lies; for no court can be intended exempt from the superintendency of the king in this court of *B. R.* It is a consequence of every inferior jurisdiction of record, that their proceedings be removeable into this court, to inspect the record, and see whether they keep themselves within the limits of their jurisdiction. *Vide* 3 Cro. 489. By the 23 *H. 8. c. 5.* the commissioners of sewers are to certify their proceeding into Chancery; and the 13 *Eliz. c. 9.* says, the commissioners shall not be compelled to make any certificate: Upon this, by mistake, they thought themselves not accountable on a *certiorari*, and refused to obey a *certiorari* issued out of the King's Bench; and for this the whole body of the commissioners were laid by the heels.

[145]

March 196, 197. &c. 1 Vent. 67. 1 Lev. 288. Raym. 126. Str. 609. Fort. 374. Ld. Ray. 469. 8 Mod. 331. 1 Keb. 129. Cowp. 524, 836. Doug. 534. Com. Cert. a.

1. 2 vol. 3 ed. p. 187. 1 Bl. Rc. 233. 2 Haw. P. C. 6 ed. 406.

4 Anonymous.

[Mich. 8 Will. 3. B. R.]

Far. 97. Vari-
ance between
writ and order.

2 Salk. 452,
434, 658. Post
146, 151.
1 Feb. 165.

1 Syd. 64. 1 Lev. 50. 1 Bull. 155.

A *Certiorari* was to remove an order against *J. S.* touch-
ing foreign salt, which being removed, appeared to
be an order touching salt (without foreign); and it was
held not to be removed, for this cause, there being no such
order.

5. *Dr. Sands's Case.*

[Pasch. 10 W. 3. B. R.]

Certiorari to re-
move conviction
of recusancy, de-
nied. Hob. 135.

Post 149. 4 Inst.
294, 295. Holt

131, S. C.

1 Roi. 395.

THE oaths appointed by the statute of the 1 *W. & M.*
c. 8, were tendered to *Dr. Sands* by two justices of
the peace, and he refusing to take them, it was certified
to the judge of assize, and by him into the exchequer, ac-
cording to the statute of the 7 & 8 *W.* 3. *c.* 27. And
now a *certiorari* was prayed to remove it hither, and a sur-
prise and trick upon *Dr. Sands* was suggested. Also the
case of *James Duke of York* was cited, who being pre-
sented upon the 3 *Jac.* 1. *c.* 4. for not coming to church,
at the quarter-sessions, it was removed hither by *certiorari*.
But *Holt C. J.* held it could not be granted, because it
would perfectly evade the statute; for when it is once in
this court, it cannot be sent back again, which would ren-
der the statute of no effect, because the party cannot be
proceeded against here; and that the case of the Duke of
York was the only case wherein it was ever done.

6. Anonymous.

[Hill. 11 Will. 3. B. R.]

Exceptions to be
taken to orders
of sewers before
the filing. Mod.
Cases 40, 43.

WHERE orders of commissioners of sewers are re-
moved into *B. R.* by *certiorari*, the Court does not
file them, but hear counsel upon the matter of them be-
fore filing; for if they are good, the Court must grant a
procedendo, which they cannot do after they are filed. *See*
per Cur. Trin. 4 Ann. B. R. We will file them in any
case where no apparent danger is likely to ensue by the
delay (a).

(a) *Vide Str.* 609.

7. *The Case of Cardiffe Bridge.*

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 580. S. C.]

CERTAIN orders of justices made pursuant to a private act of parliament for repairing *Cardiffe Bridge*, were removed hither by *certiorari*; and one objection was made, That this Court could not send a *certiorari* to the justices of the peace in *Wales*; because it might be sent by the Court of Grand Sessions, which was as the King's Bench, and which by this means was skipped over and rendered useless. *Sed non allocatur*: It is the constant practice to send them into the counties palatine, and yet they have original jurisdiction, and the same courts within themselves. The counsel for the *Welsh* jurisdiction said, this differed, because the jurisdiction of counties palatine was derived from the crown. But this was not regarded. And the Chief Justice said, that, in case of sewers, this Court inquires into the nature of the fact before they grant a *certiorari*, that no mischief may happen by inundations in the mean time; but this is only a discretionary execution of their authority, for wherever any new jurisdiction is erected, be it by private or public act of parliament, they are subject to the inspections of this Court by writ of error, or by *certiorari* and *mandamus* (a).

Certiorari lies to justices of the peace in *Wales*, and counties palatine. 1 Vent. 93, 146. Poph. 144. 1 Mod. 64, 68. 2 Keb. 685, 724, 797. &c. Latch. 12. Allen 49. Styl. 87. 8 Mod. 146. Wilf. 320. Atk. 175, 182.

(a) *R. acc. Strange* 553, 704. *Bur.* 6 ed. 407. ch. 27. p. 25. 234. 2439. *D. acc.* 2 *Harw.* P. C.

8. *Rex versus Levermore.*

[Trin. 12 Will. 3. B. R.]

A *Certiorari* issued to remove a conviction of deer-stealing, and the justices returned two affidavits, and a warrant to distrain; and the return was quashed as imperfect.

9. *Rex versus Brown & al.*

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 609. S. C.]

WILLIAM Brown, Francis Wood, and Leonard Fosbrook were jointly indicted at the sessions, and Brown was also severally indicted; and Wood and Fosbrook, and one J. S. were indicted in another indictment; and a *certiorari* was awarded to remove all indictments;

Variance. *Certiorari* to remove indictment against A. will not remove indictment against A. and B. Ante

in

145. 2 Salk. 452, 658. March 112. 1 Lev. 50. 1 Balst. 155. 3 Salk. 78. S. C. 1 Roll. Abr. 395. Doe. Recordari, pl. 2. Dier 34. 1 Ander. 133. 2 Ander. 149. 2 Samd. 292.

in quibus idem Willielmus, Franciscus & Leonard. indictati sunt; without saying vel aliquis eorum indictas. existit. Et per Cur. None of the indictments are removed, but only the joint indictment first mentioned, and the justices below may proceed on the others without contempt (a).

(a) *Vide Str. 845. R. acc. Ld. P. C. ch. 27. sect. 85. Raym. 1199. Poph 151. Vide 2 Hawk.*

[147] 10. Domina Regina versus Paroch. St. Mary's in the Devises.

[Pas. 1 Ann. B. R.]

The very order must be returned. 2 Salk. 493. 1 Sid. 229, &c. 1 Keb. 252. 3 Salk. 80. S. C. Shaw. P. L. 210. 2 Hawk. P. C. ch. 27. sect. 76. 2 Atkyns 317.

ON: a certiorari to return an order, it was returned, *cu- jus quidem tenor. sequitur in hac verba*, and not *qui quidem ordo sequitur in hac verba*; and it was qualified for this reason.

11. Regula Generalis.

[Pas. 1 Ann. B. R.]

A Rule was made that no certiorari should be granted to remove orders of justices, from which the law has given an appeal to the sessions, before the matter be determined on the appeal, because it hinders the privilege of appealing; and that if any order be removed before appeal, it should be sent down again: But if the time of appeal be expired, that case is not within the rule. *Per Holt C. J.* But afterwards in *Mich. 4 Ann. B. R.*, in the case of the inhabitants of *Sbellington*, it was held, that advantage must be taken of this rule upon the motion to file the order, for that after it is filed it is too late.

12. Domina Regina versus Nash.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 989. S. C. Entries 37.]

THE defendant was convicted of deer-stealing, and a warrant was awarded to the constable to levy, &c. He accordingly distrained, and then came a certiorari to remove the conviction; and after the record removed, the constable sold the goods, but would not part with the money, or return the warrant. And the Court held,

1st, That

Certiorari is no supersedeas to an execution begun before that issued. 2 Salk. 564. Far. 120. Moor. 542.

1st, That the constable might well proceed in the execution after the *certiorari*, because it was begun before, and the *certiorari* no more stays it than a writ of error of a judgment in *C. B.* stays the execution of a *fiery facias* already begun to be executed. And in that case, if the sheriff returns want of buyers, the *Common Pleas* may award a *venditioni exponas*, notwithstanding the writ of error pending (a).

Yelv. 6.
1 Vent. 245.
Mod. Cases 83.

2dly, That this Court had no power over the warrant, being granted before the *certiorari* issued, and therefore they refused to make a rule upon the constable to return it; comparing it to the case of a writ of execution delivered, &c. before a writ of error. But they said the justices might fine him, if he would not return his warrant, or deliver over the money to the prosecutor.

(a) *Vide* 2 Hawk. P. C. ch. 27. sect. 63.

13. Cross *versus* Smith & al.

[148]

[Hill. 1 Ann. B. R. 2 Ld. Raym. 836. S. C.]

A Writ of error was brought in *B. R.* of a judgment in the court of the isle of *Ely*, in an action upon the case for words. The error assigned was, that a *certiorari* issued out of *C. B.* to remove the cause, and was allowed, and yet they proceeded below afterwards. The defendant in error pleaded a grant to the bishop of *Ely* of consuance of pleas, and shewed an allowance of it in this court, 21 *E.* 3.; and that the cause arose within the jurisdiction, and that they returned this matter to *C. B.* upon the writ of *certiorari*, and so the court below had good authority to proceed; and to this plea there was a demurrer. And three things were insisted on for the defendant in error. 1st, That no *certiorari* ought to lie to the court of *Ely* by reason of the franchise, which is a consuance of pleas; and because the Court above cannot proceed on the record removed by the *certiorari*, but the plaintiff must be driven to his new original. 2dly, Because the *certiorari*, admitting it lay, was no *superfedeas*. 3dly, That the cause below could not be removed by the *certiorari*, because the plaint was not entered at the time of the *teste*, but after the *teste*, and before the return of the writ. But *per Cur.* As to the first matter; it is not the plaintiff's expence, but the defendant's liberty, that is to be considered in this case. For if the franchise be *tenere placita*, then this Court hath a concurrent jurisdiction, and the defendant may choose whether he will be sued there, or in the king's superior courts; for he may be a stranger in the franchise, and not

Far. 138. *Certiorari* lies to all inferior jurisdictions. 3 Salk. 79. S. C. Cases B. R. 643.

Ante 246. Al.
ken 49. Stil. 87.
Vid. 5 and 6 W.
& M. c. 11.
Fas. 5.

2 Saik. 564.
Far. 120. 1 Syd.
317. 2 Keb.
238. Ante 147.
Far. 38, 84, 85.
Post 201. Far.
138. Comb. 1,
2. 2 Keb. 1; 1,
acc.

*[149]

able to find bail there, and it may be dangerous to be tried by a jury of strangers. Besides, as the statute of the 27 H. 8. says, there is as much difference between the king's ministry of justice in his superior court and his inferior courts, as between being governed by the king in person, and by his deputy; therefore it is that this court hath a superintendency, and, to prevent oppression, may award a *certiorari* to any inferior court; and the subjects right to writs of *certiorari* appears by the 43 Eliz. c. 5. and 21 Jac. 1. c. 23. which restrains the abuse of them (a). 2dly, A *certiorari* lies to a franchise that hath a conuſance of pleas, which is more than a bare franchise *temere placita*. 3dly, It lies to an exempt jurisdiction, for that franchise is only for the benefit of the defendant, which he may waive if he pleases. And even in case of a customary proceeding by foreign attachment, if a defendant cannot find bail below, he may bring a *certiorari*, and, on putting in bail above, the cause shall go on there. As to the second objection, the Court held, a *certiorari* was a *superſedeas*, by the same reason that a *habeas corpus* is. Vide 1 Cro. 261. 2 Jon. 209., and that therefore all proceedings * after a *certiorari* allowed, were erroneous (b); and that an attachment would have lain, if they had not allowed the *certiorari*. As to the third objection, it was held, that this plaint was well removed; for a *certiorari* is like a *recordari*, which removes all things pending at any time between the *teste* and the return (c). Vide 1 Vent. 63. 1 Ro. Abr. 395. F. N. B. 71. a. c. 3 H. 6. 30. b. New Thef. Brev. 37. 3 Brownl. 335. (d).

(a) Vide Bur. 856. 2 Lev. 85. Com. *Certiorari*, A. 1.

(b) R. Mar. 27. Vide 2 Hawk. P. C. ch. 27. f. 64.

(c) R. acc. Ld. Raym. 1305.

(d) Note to the 6th ed. of 2 Hawk. ch. 27. f. 23. *Certiorari* lies to remove a presentment in a court-leet, and when removed, the presentment is traversable, Corp. 458. It lies to remove examinations taken before justices of the peace, in pursuance of the 2d and 3d Ph. and M. ch. 10. Rex v. Belton, Mic. 26 Geo. 3. It lies to a jurisdiction created by private act of parliament, Ld. Raym.; and to remove proceedings before commissioners of bankrupts, Ld. Raym. 580. But without laying a special ground before the court, it cannot be sued out

to remove proceedings in an action from the courts of the counties palatine, Doug. 749. It lies to remove an information before justices of assize against a person for non-residence, for they have no jurisdiction, Andrews 27. But not to justices of *oyer and terminer* to remove a recognizance of appearance, Lucas 278. It lies to remove an indictment for not doing statute labour on the highway, Str. 849. *sed vi*. Str. 994; or for not repairing a bridge, Str. 900. It lies to the quarter sessions of a corporation, Ld. Raym. 1452. So also to remove proceedings before two justices, Str. 470 and 343. To remove orders of conviction on the *Conventicle Act*, 22 Con. 2. ch. 1., 2 Bur. 1040. To remove an order on an appeal from scavengers rate,

rate, 2 *Bur.* 1458. But it will not lie to remove a poors rate, *Str.* 932, 975. It will lie to remove an order of bastardy if applied for in six months, 2 *Wilf.* 35; to remove an inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon.

14. *Domina Regina versus Bothell.*

[*Trin.* 2 *Ann. B. R.*]

CERTIORARI was to remove an indictment, and there being no bail indorsed upon the writ, the Court said, the writ should not have been allowed, for it was against the late act of parliament.

Not to be allowed without bail. 2 *Salk.* 564. *Far.* 120, 121. *S. C.* 6 *Mod.* 17, 33. *Set.* and *Rem.* 220. *Holt* 157.

15. *Domina Regina versus Porter.*

[*Mich.* 2 *Ann. B. R.* 2 *Ld. Raym.* 937. *S. C. quod vide.*]

H. Being indicted and convicted for beating certain officers, on the statute of 14 *Car.* 2. obtained a *certiorari* to remove the indictment, &c. in *B. R.*: and Northey attorney-general moved for a *procedendo*, urging it was inconvenient that a *certiorari* should be granted after conviction and before judgment, because the justices who tried the cause were best able to set the fine. *Et per Cur.* A *certiorari* lies after a conviction and before judgment, for perhaps it may be proper to give judgment in this court; and sometimes it happens that a writ of error will not lie: however a writ of error will lie in this case, because it is a formal proceeding grounded on an indictment. And therefore because the party, if grieved, might have remedy by writ of error, and it was not so proper to set the fine in this court, a *procedendo* was granted. And *Holt C. J.* said, that upon a conviction at the assizes, if the judge of assize doubt of the judgment, he may remove the record into this court by *certiorari*; and that upon judgment here a writ of error of a record *coram vobis residet*. lies; and that it is the course of the crown-office, and was so done by *C. J. Scroggs (a)*.

Certiorari not proper after conviction unless where error lies not, or fine ought to be set in *B. R.* *Pott* 150. *Carth.* 6. 1 *Vent.* 33. 1 *Sid.* 419. *S. C.* 6 *Mod.* 17, 33. *Holt* 132.

(a) *Vide* 2 *Hawuk. P. C. ch.* 27. *sec.* 31.

16. Anonymous.

[Mich. 2 Ann. B. R.]

Return in Eng-
lish allowed.
5 Mod. 12.

ONE that made and sold cyder was convicted for not paying the duty upon the late statute; and on a *certiorari* to remove the conviction, the justice made his return in *English*, which Mr. *Cheshire* moved to quash; but it was allowed to be good in this case.

[150]

17. *Domina Regina versus Dixon.*

[Hill. 2 Ann. B. R. 2 Ld. Raym. 971. S. C.]

Certiorari ought
to be to remove
indictment and
conviction,
where defendant
is convicted.
6 Mod. 61. S. C.
3 Salk. 78.

A *Certiorari* after conviction ought to be to remove the indictment and conviction, and if it make mention of the indictment only, and not of the conviction, it may be quashed; and if the party take it out before conviction, but will not use it till after, he ought to lose the benefit thereof.

18. *Regina versus Knatchbull & al.*

[Hill. 2 Ann. B. R.]

Certiorari not
granted to jus-
tices of gaol-de-
livery, unless for
special cause.

A Motion was made for a *certiorari* to remove an indictment found at the assizes in *Kent*, against Mr. *Knatchbull* and others, but denied, though earnestly pressed for; also the same thing was done in Mr. *Thornbury's* case, who, with others, was indicted at the *Old Bailey* for a Jacobite conventicle, and it was pressed by him in person to have a *certiorari*, intimating partiality and prejudice in the lord mayor and aldermen against him; but at last it was denied for this particular reason, viz. that the motion happened in the end of *Hilary* term, so that it would occasion a delay of justice; otherwise it seems they would have granted it.

Post 151. Ante
144.
Vi. 2 Hawk.
P. C. ch. 27.
sect. 27.

19. *Domina Regina versus White.*

[Pas. 4 Ann. B. R.]

Certiorari to re-
move orders;
fiat must be sig-
ned by a judge;
to remove indict-

A *Certiorari* was granted to remove an order of sessions made by the justices of *Northamptonshire*, for removing a high constable and putting in another. Sir *James Montague* moved for a *procedendo*, because the writ was made out

out on the *Saturday* before the term, *teste* the 12th of *February*, and the *fiat* was not signed till the first day of this *Easter* term, and a *procedendo* was granted for this irregularity: And it was held, that in writs of *certiorari* granted to remove orders, the *fiat* for making out the writ must be signed by a judge, and the writ itself need not; but in case of writs of *certiorari* to remove indictments, the *fiat* must be signed and the writ too, and that the latter is required by the late act of parliament: And *Holt* C. J. said, that if the *fiat* had been signed on the same day the writ was taken out, that would have been well, because it was before the *effoin-day*; but a *fiat* signed this term, cannot warrant a *certiorari* tested the last day of last term: Also they held: high constables might be removed, as well as petit constables, and the justices at sessions were the best judges of that matter.

ments, both writ and *fiat*. Vide 1 Lill. 255. *Holt* 132. S. C. 2 Hawk. P. C. ch. 27. sect. 40.

High constables removable.

20. Nehuff's Case.

[151]

[Pasch. 4 Ann. B. R.]

MR. *Montague* moved for a *certiorari* to remove an indictment at the *Old Bailey* for a cheat. The case was, That the defendant borrowed 600*l.* of a *feme covert*, and promised to send her fine cloth and gold dust as a pledge, and sent no gold dust, but some coarse cloth worth little or nothing: they offered to try it the same term, which would be a benefit to the prosecutor, who by the course of the *Old Bailey* could not try it so soon; and the Court granted a *certiorari*, because the fact was not a matter criminal, but it was the prosecutor's fault to repose such a confidence in the defendant (*a*); and because it was an absurd prosecution, and the defendant offered to try it that term (*b*).

Certiorari granted to the *Old Bailey*, for special cause.

Vi. Str. 549. 1042.

Ante 144, 150.

(*a*) *R. acc.* 1. *Wilf.* 301. 2 *Bur.* 1125. 1 *Bl. R.* 273; and *vide Gilb. Law of Evidence*, by *Loft.* 659.

(*b*) For divers cases of *certioraris* being granted to the *Old Bailey*, see note to 6th ed. of *Hawk.* vol. ii. pa. 408.

21. Domina Regina versus Barnes.

[*Mich.* 4 Ann. B. R. 2 *Ld. Raym.* 1199. S. C. called *R. v. Baines.*]

AN order was made against *A.*, and the *certiorari* was to remove all orders against *A.* and *B.* *Et per Cur.* This shall not remove the order against *A.* alone, but it ought to be for all orders against *A.* and *B.* or either of them.

Variance. Ante 145, 146. 2 *Salk.* 452, 434, 658.

22. Sir Godfrey Kneller's Case.

[Pasch. 5 Ann. B. R.]

After certiorari to remove inquisition of forcible detainer, justices cannot award restitution.

IF there be a forcible detainer, and an inquisition taken, and then a *certiorari* to remove the inquisition, and then there is a new forcible detainer, the justices may, notwithstanding the *certiorari*, record the force; but they cannot proceed to award restitution: So if after the inquisition, and before the *certiorari*, there had been a forcible detainer, the justices might have recorded the force; but all proceedings upon such inquisition are stopped (a).

(a) Where a prosecutor moves for to obtain it, or to remove the record a *certiorari*, it goes of course; but the back again by *procedendo*, *Bur.* 2460, defendant must shew a special ground and *vide* 2 T. R. 89.

1. Anonymous.

[Trin. 1 W. & M.]

Challenge for favour.

UPON a trial at bar the question was, Whether the fair called *Way-Hill* fair, should be kept at *Way-Hill*, or at *Anderry*? And one of the jury was challenged because he lived at *Way-Hill*; and the objection was, that the fair occasioned manure to improve the ground. On the other side it was considered, that the fair occasioned trampling of the grafs. This being a challenge to the favour, two of the jurors were sworn to be triers, and their oath was, *You shall well and truly try whether A. (the jurymen challenged) stands indifferent between the parties to this issue.*

2. Rex & Regina *versus* Warrington & al.

[Pasch 3 W. & M. B. R.]

INFORMATION for a riot committed in *Chester*; it was suggested upon the roll that one of the sheriffs was a defendant, upon which the *venire facias* was prayed and directed to the other sheriff. Upon not guilty pleaded, the jury found them guilty; after which it was moved in arrest of judgment, that the *venire* should have been awarded to the coroner, because both sheriffs make but one officer, or rather that both persons make but one sheriff: *Sed non allocatur*; for though one be challenged, the other may execute the writ, but he does it in the name of both; as where one arrests a man or neglects to arrest a man, the arrest or neglect is the act or neglect of both. The coroners are not the proper officers of the court in any other case but where the sheriff is absolutely improper; not where there is no sheriff at all. If the sheriff die, the coroner cannot execute, &c. In the case of two coroners, if one be challenged the other must act, and yet both make but one officer; so in this case one sheriff is challenged, *ergo* the other must act. 2 *Mod.* 24, 199.

4 *Mod.* 65.
Carth. 214. S.C.
1 *Show.* 327.
Comb. 191.
Cases B. R. 22.
Holt 166.
Where two persons are sheriffs, and one is challenged, the *venire* shall be directed to the other. 3 *Lev.* 399. 6 *Mod.* 37. *Show.* 400.

3. Anonymous.

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COOKE being indicted for high treason, and the jury called, he offered to ask the jurors, in order to challenge them, if they had not said he was guilty, or would be hanged. *Et per Cur.* This is a good cause of challenge, but then the prisoner must prove it by witnesses, not out of the mouth of the juryman. A juryman may be asked upon a *voir dire*, whether he hath any interest in the cause; whether he hath a freehold; for these do not make him criminal: but you shall not ask a witness or juryman, whether he hath been whipped for larceny, or convicted of felony; or whether he was ever committed to *Bridewell* for a pilferer, or to *Newgate* for clipping and coining; or whether he is a villain or outlawed; because that would make a man discover that of himself which tends to shame, crime, infamy, or misdemeanor: So it is in this case, the answer would charge him with misdemeanor or misbehaviour. *Et per Powell, Justice*: In a civil cause you may perhaps ask a man if he has not given his opinion beforehand upon the right; for he might have done that as arbitrator between the parties: Otherwise in this case. *Cook's Trial*, 21, 28.

Juryman may not be examined to any matter criminal or infamous, in order to challenge. 1 *Lill.* 555.

Co. Lit. 158. b.
3 *Bl. Com.* 364.

Chancery.

1. Anonymous.

[Mich. 1689. In domo Procerum.]

Land settled in trust to pay debts is discharged as soon as the money is raised, though misapplied by the trustees. Mod. Cases, &c. 171.

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A Man limited an estate to trustees for payment of debts and legacies: The trustees raised the whole money, and the heir prayed to have the land; and this was opposed, because the trustees had not applied the money, but converted it to their own use, so that the debts and legacies remained unpaid: It was resolved, that the heir should have the land discharged, and the legatees should take their remedy against the trustees; for the estate was debtor for the debts and legacies, but not for the faults of the trustees, and therefore is only liable so long as the debts, &c. should or might be paid. And where the land has borne once its burden, and the money is raised, it is discharged, and the trustees liable (a).

(a) *R. ac. Carter v. Barnardiston*, 1 P. Wms. 518.

2. Best *contra* Stamford.

[Mich. 4 Ann. In Canc.]

Term created for a special purpose, after that determined, is attendant on the inheritance. Eq. Abr. 274. p. 10. S. C. 2 Vern. 520. Pre. Ch. 252. 2 Wilson 329.

FEME sole seized in fee, upon her marriage with A., makes a lease, to trustees for 100 years, in trust for the husband for his life, remainder to herself for life, remainder to the issue of that marriage, remainder to the wife, her executors and administrators; husband dies without issue; she marries a second husband, and dies: Whether this term should be attendant upon the inheritance, or should go to the husband as a term in gross, was the question. *Et per Cur.* It is a term attendant, because the trust for which it was created is at an end, the first husband being dead without issue: As where a term is created to raise portions, and the portions are paid; or a termor purchases the inheritance in trust, the term shall be attendant. And as for the second husband, it cannot be intended that he was then thought of.

" Money articted to be laid out in land, shall be taken as land, in equity ; for this Court is to enforce the execution of agreements, and therefore looks upon land agreed to be sold, as money, and money agreed to be laid out in land, to be in fact a real estate, which shall descend to the heir: *Sed quare*, If money be articted to be laid out in land, in a marriage settlement, upon failure of issue, and there is no issue, but debts by simple contract ; whether this money shall be taken as land, and thereby defeat creditors ?" (a)

In equity land agreed to be sold shall go as money, and money agreed to be laid out in land, as land. Mod. Cases, &c. 171.

(a) *Vide Powell* on Contracts, vol. ii. 105, 106. *Br. Cb.* 223. 3 *P. Wms.* 217.

3. Anonymous.

[27 Junii 1707. At Lord Chancellor's House.]

IT was held, 1st, That if one by will or deed subject his lands to the payment of his debts, debts barred by the statute of limitations shall be paid ; for they are debts in equity, and the duty remains ; the statute has not extinguished that, though it hath taken away the remedy (b). 2. It

Where lands are devised to pay debts, debts barred by the statute of limitations shall be paid. 2 Vern.

(b) This point has been agitated in subsequent cases, and does not appear in any of them to be judicially settled. In *Blakeway v. the Earl of Strafford*, 2 *P. Wms.* 373. *Sel. Ca. in Cb.* 57. 2 *Eq. Ca. Ab.* 579. pl. 6. the statute of limitations was pleaded to a bill filed to have the benefit of a devise in trust for payment of debts, and the plea was over-ruled ; but the House of Lords reversed the decree, and ordered the plea to stand for an answer, 3 *Bro. P. C.* 305. In *Jones v. the Earl of Strafford*, 3 *P. Wms.* 78, upon a similar case, the same order was made ; but no further proceedings appear to have been had in either of these causes. In *Lacon v. Briggs*, 3 *Atk.* 107., Lord *Hardwicke* is reported to have said, that " he wondered how the rule at first prevailed, and judges always grumbled at it, though it is now established in equity." In that case payment was presumed from circumstances and length of time. In *Oughterloney v. Earl Powis*, *Ambler* 231, the question came again before Lord *Hardwicke*, who said that he should be un-

der some difficulty to determine the case if it depended upon that point. That case was also decided upon the presumption of payment arising from length of time. In *Trueman v. Fenton, Cowp.* 548, the following observation was made by Lord *Mansfield arguendo* : Where a man devises his estate for payment of his debts, a Court of Equity says (and a Court of Law, in a case properly before them, would say the same), all debts barred by the statute of limitations shall come in and share the benefit of the devise, because they are due in conscience.

The following cases may perhaps be deemed analogous to the present subject, *Marlow v. Pitfield*, 1 *P. Wms.* 558. 2 *Eq. Ca. Ab.* 516. On a devise for payment of debts with interest, a debt fairly contracted during infancy was decreed to be paid. *Quanlock, assignee of England, v. England*, 5 *Bur.* 2628. 2 *Bl.* 702. The debt of the petitioning creditor on a commission of bankrupt was contracted above six years before the issuing of the commission ; the bankrupt submitted, and it

141. Eq. Ca. Ab. 139. Where bond shall carry interest beyond the penalty. Mod. Cases, &c. 33. Eq. Ca. Ab. 288.

2. It was held, That if there be a bond-debt, and the interest hath out-run the penalty, it shall not carry interest beyond the penalty; for the design of the settlement was not to increase the debt beyond what is due, but to give a farther security; however, if the devisee or trustee neglects to pay in a reasonable time, he shall, after such neglect, pay interest beyond the penalty; *per Cowper*, Lord Chancellor.

it was held that no objection could be taken by a third person, because the statute does not destroy the debt, it only takes away the remedy. The

same was held in *Swayne v. Wallinger*, 2 Str. 746. *Vi. ante* 28. *Prec. Ch.* 385.

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4. Anonymous.

[Mich. 6 Ann. In Canc.]

Trustee buying in debts for less than is due, shall not be allowed for the whole. Otherwise of one purchasing in his own right. 1 Vern. 49, 336, 464, 476.

IF a trustee or executor compound debts or mortgages, and buy them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it; and for want of them, the benefit shall go to the party who is entitled to the surplus; but if one acts for himself, and being not in the circumstances of a trustee or executor, buy in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due upon the mortgage; for he stands in the place of him that assigned, *viz.* the mortgagee, who might have given it to him *gratis*; and what is due must be the measure of our allowance, and not what he gave; for that might have been more than it is worth, as well as less; and since he runs the hazard, if loss happens, he ought to have the benefit in case it turns to advantage: So said and admitted *per Cowper*, Lord Chancellor (*a*).

(a) *Fide* 2 Com. Dig. 3d edit. 720. Chancery, 4 W. 30.

5. Cuthbert *contra* Peacock.

[Mich. 6 Ann. In Canc.]

Legacy to a creditor, greater or less than his debt, how to be taken. Eq. Ab. 204. p. 8. S. C. 2 Vern. 593.

HOwed his niece *A.* 100 *l.* by bond, and having two other nieces, *B.* and *C.*, makes his will, and bequeaths 300 *l.* to his niece *A.*, and to his two other nieces 200 *l.* a-piece. After that he borrowed another 100 *l.* of his niece *A.*, and, being indebted to her in 200 *l.*, died; and to prove the 300 *l.* should go in satisfaction of the debt, Mr. *Vernon* insisted, that it was the rule in equity, and had been often decreed, that where a testator, being indebted, gives

gives his debtee a legacy greater than his debt, it shall go in satisfaction; for a man shall be intended to be just before he is kind; otherwise where a legacy is less, for that is neither to be just nor kind, and shall not be taken to go in satisfaction of any part. *Cowper*, Lord Chancellor, said, It might be as good equity to construe him to be both just and kind, if he intended to be both; that if any part of 300*l.* be applied to the payment of the debt, as for so much it is not a gift, whereas a legacy must be taken to be a gift or gratuity (a): And there being assets and some proofs of the testator's greater kindness to *A.* than his other nieces, his Lordship decreed her the whole 300*l.* over and above her debt (b).

2 Vern. 259, 478, 505. 2 Wms. 553, 617. 2 Br. Ch. 400.

Legacy must be taken to be a gift.

(a) *R. acc. post* 508.

(b) *Vide* 3 *Atk.* 65. The rule, that where a debtor gives a legacy as large or larger than the debt it shall be considered as a satisfaction, is fully established. Though courts have not approved of it, and always endeavour,

if there is any room for it, to distinguish cases out of it, 3 *Atk.* 96., appointing the legacy to be paid at a future period, however near, takes the case out of the general rule. *Vide* 2 *Vez.* 635. 2 *P. Wms.* 555. 2 *Atk.* 300. *Proc. Ch.* 270.

6. Kemp contra Coleman.

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[Mich. Vacation, 6 Ann.]

PER eundem Dominum Cancellar. inter Kemp & Coleman, Mich. vac. 1707. It was laid down as a rule in equity, that where the son without the privity of the father or parent treating the match, gives a bond to return or refund any part of the portion, it is void (c).

Bond given to refund part of portion without father's privity, is void.

(c) Any private agreement or treaty, infringing the open and public agreement of marriage, is considered as fraudulent, *Peyton v. Bladwell*, 1 Vern. 240. *Redman v. Redman*, 1 Vern. 348. *Gale v. Lindo*, 1 Vern. 475. *Lamlee v. Hanman*, 2 Vern. 499. *Keat v. Allen*, 2 Vern. 588. *Webber v. Farmer*, 2 Bro. P. C. 88. *Morrison v. Arbutnot*, 1 Bro. Ch. Rep. 548. n. *Pitcairne v. Ogbourne*, 2 *Vez.* 375. "In *Newville v. Wilkinſon*, before Lord *Thurlow*, in November 1782, his Lordship said he would not lay it down as a rule that fraud in cases of this nature must be upon an article expressly contracted for, but any representation misleading the parties contracting on the subject

of the contract, was within the principle of the other cases; and his Lordship relieved by injunction against a bond entered into by the plaintiff to the defendant before the plaintiff's treaty of marriage, the defendant having by the plaintiff's desire, upon the occasion of such treaty, misrepresented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in question, and this relief was given, although it did not appear there was any actual stipulation on the part of the wife's father in respect of the amount of the plaintiff's debts. *Vide etiam* *Key v. Bradshaw*, 2 Vern. 102. *Woodhouse v. Shepley*, 2 *Atk.* 535. *Blanchett v. Fej*

ter, 2 *Vez.* 264. *Montefiori v. Montefiori*, 1 *Bl. Rep.* 363. *Jackson v. Duchaire*, 3 *Term Rep.* 551." The above is a note by Mr. Cox to the case of *Roberts v. Roberts*, 3 *P. Wms.* 74. In *Turton v. Benson*, 1 *P. Wms.* 496, it was held that a private bond to pay back part of the portion was void, notwithstanding it had been assigned for the benefit of creditors. The party to any such private agreement is entitled to be relieved against it, as appears from most of the cases. In *Peyton v. Blakewell*, it was held that a release procured after marriage from the husband by the person who had agreed to settle an estate on him, was void. In *Roberts*

v. Roberts, upon the son's marriage, there was a power to the father to settle a jointure upon any woman he might afterwards marry, paying 1000 *l.* to the son. Upon the father's marrying, the son was prevailed upon by him to release the 1000 *l.* and to notify such release to the friends of the father's intended wife, the father giving a private bond for paying the same. The Court refused to relieve against this bond, as the release was in fraud of the first marriage. Most of the cases on this subject are fully stated in *Powell on Contracts*, 2 vol. 163 to 177.

7. Grimston contra Lord Bruce & Ux.

[In Canc. 1707.]

Lands devised to J. S. paying the heir 20,000 *l.* within 20 years, at 1000 *l.* per ann. Heir entered for non-payment, as for forfeiture, and devisee relieved. 2 *Vent.* 352. In cases of forfeiture, equity can relieve where they can give satisfaction. Interest. *Eq. Ab.* 108. p. 4. *S. C.* 2 *Vern.* 366, 594. 1 *Ch. R.* 161. 1 *Vern.* 83.

Taxes.

H Devisee his lands to J. S. and his heirs, on condition to pay 20,000 *l.* to the heir at law, viz. 1000 *l.* per annum, for the first sixteen years, and 2000 *l.* per annum after that, till the whole should be paid; the heir entered for non-payment of one of the 1000 *l.* per annum, and J. S. brought his bill; and it was objected, that the condition restores the heir, and that Chancery ought not to aid in disherison of him: But it was resolved by *Cowper*, Lord Chancellor,

1st, That the entry of the heir in this case was only to enforce the payment of his principal; as where a mortgagee enters; and that the Court can give him interest for the same from the time it became payable; and that wherever the Court can give satisfaction or compensation for a breach of condition, they can relieve.

2dly, That for every 1000 *l.* from the time it became payable, the legatee or heir should have interest, because both the sum and time of payment were certain and past.

3dly, That there is to be no deduction of any taxes, because it is not to issue nor arise from the lands, but is given as a sum in gross, secured by entry on the lands for non-payment.

8. Higgins contra Derby.

[Mich. Vacation, 6 Ann. S. C. 1 Wms. 98. 2 Vern. 600.
called Higgins v. Dowler (a).]

TRUST of a term of years was declared to the husband for life, remainder to the wife for life, remainder to the first son of their bodies, and the heirs male of the body of such first son, (and so on to every other son,) and for want of sons, then to the daughters of the said husband and wife. The husband and wife died, and there was no son of the marriage, but there was a daughter; and the question was, Whether she should take by virtue of this limitation, it being after a limitation in tail to the sons? *Et per Cowper*, Lord Chancellor, Where the limitations to the sons ever took effect, and * the estate vested, the remainder and limitation to the daughters become void: But if there never was a son, as it happened in this case, the remainder is good; for the limitation must be construed, if there be a son, then to him; if no son but a daughter, then to her (b).

Remainder of a term limited to daughters after a limitation in tail.

If the estate-tail was contingent and never took effect, the daughters shall take; otherwise not. Post 215. Vi. Rep. B. R. temp. Hard. 416.

* [157]

But upon reading the settlement it appeared to be thus, *And in default of issue male of the body of the said husband, then to the daughters*: And therefore it was held, that the husband took an estate-tail, and for that reason the limitation to the daughters was held void, being after a plain limitation in tail to the husband (c).

(a) *Vide* 1 Vex. 202.

(b) The following note is subjoined by Mr. Coxe to the report of this case, 1 P. Wms.

"Notwithstanding that the authority of this case has been in some instances called in question, (as in *Clare v. Clare*, Ca. tem. Talb. 26, *Wjth v. Blackman*, 1 Vex. 202.) yet it seems now fully established, by *Stanley v. Leigh*, 2 P. Wms. 686. *Brooks v. Taylor*, Mos. 188. *Stephens v. Stephens*, Ca. temp. Talb. 228. *Gower v. Grojvenor*, *Barnard*. 54. *Sheffield v. Lord Orrery*, 3 Atk. 287. *Pelham v. Gregory*, 5 Bro. Parl. Ca. 435. *Doe v. Fonnereau*, Doug. 470. *Marsh v. Marsh*, 1 Bro. Cha. Rep. 293. *Knight v. Ellis*, 2 Bro. Cha. Rep. 570. *Hockley v. Mawbey*, 3 Bro. Cha. Rep. 82. The result of which cases (in the words of Mr. *Fearne*) is, "that whatever number of limitations there may be after

"the first executory devise of the whole interest, any one of them, which is so limited that it must take effect (if at all) within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested." *Fearne's Cont. Rem.* 47. *Vide* also the notes to *Doe* vers. *Fonnereau*, Doug. 485. et seq."

(c) From the report in *Vernon* it appears that the question arose upon a demurrer; and Sir *Jos. Jekyll*, in *Stanley v. Leigh*, 2 Wms. 618, says, that as to what is said at the end of the case

in *Salk.* that it could be no ingredient in the judgment of the Court; for on arguing a demurrer, the court cannot go out of the pleadings; and this must therefore be a mistake. And it is observed by Mr. *Fearne*, (*Essay on Cont. Rem.* 2 ed. p. 409.) that although an indefinite failure of issue male of the body of the husband would

have been too remote, yet as he took an express estate for life before, and this was not the case of an inheritance, it by no means follows that he took any estate by words of implication; and the words *in default of issue male* might well refer to such default of issue male as was before expressed.

9. Whitlock *contra* Waltham.

[27 Jan. Hill. 7 Ann. *At the Rolls.*]

Payment of interest of mortgagee to the scrivener is good, if he has the bond or mortgage-deed. *Eq. Ab.* 145. p. 4. *S. C.* 1 Vern. 150. So of principal, if he deliver up the bond. *Ca. Ch.* 93. *Vi.* 2 Vern. 128, 265. *Pic. Ch.* 209.

Otherwise of mortgage-deed.

If mortgagee agrees, it is well during mortgagee's life, tho' he hath neither bond nor mortgage.

And after his death, if executor agree to it expressly or by implication.

THE interest of a mortgage was paid to and received by the scrivener that put out the money; the scrivener proved insolvent; and the question was, Who should bear the loss? And it was admitted in this case, first,

That if the scrivener be entrusted with the custody of the bond, he may receive the interest; and though he fails, yet the mortgagee shall bear the loss: And that so it is also in such case, if he receive the principal and deliver up the bond; for being entrusted with the security itself, it shall be presumed he is entrusted with a power over it, and with a power to receive the principal and interest; and the rather because the giving up of the bond upon the payment of the money is a discharge thereof; otherwise if the obligee take away the bond, for then he hath no authority to receive any money.

2dly, If a scrivener be entrusted with the mortgage-deed, not the bond, he hath only authority to receive the interest, but not the principal; because the giving up the deed is not sufficient to restore the estate, but there must be a re-conveyance; whereas the giving up a bond is in law an extinguishment of the debt.

3dly, That though the scrivener has neither the custody of the mortgage nor the bond, yet if the mortgagee agrees that the mortgagor shall pay the interest to the scrivener, the interest may be well paid to the scrivener, as long as the mortgagee lives.

4thly, That if the mortgagee dies, and his executor comes to the scrivener, and receives interest of him and at his hands, that became due after the death of the mortgagee; this is a good payment; and if after such receipt the scrivener breaks, the mortgagor shall not bear the loss; for it was the mortgagee that trusted the scrivener, and the executor came into the agreement, and thereby renewed it, supposing it was determined by the death of the mortgagee, but it was rather an agreement than an authority, and could not die with the party. *Nota*, This was the principal case, and affirmed by *Cowper*, Lord Chancellor.

10. York *contra* Stone & al.

[Nov. 16. Mich. 8 Ann. In Canc.]

THREE persons being jointly interested in the trust of a term of years, one of them mortgaged his third part; and the question was, Whether the joint-tenancy was severed in this case? It was admitted to be a settled point in Chancery, That if *H.* makes his will, and devises his land to one in fee, and after mortgages his land to another in fee, this is no total revocation, but the equity of redemption shall pass by the devise. But *Cowper*, Lord Chancellor, held, that a joint-tenancy is an odious thing in equity; that as to the case of the will, it might be for the benefit of the mortgagor, that this will should not be revoked; but that it is to the disadvantage of the mortgagor that the joint-tenancy should continue; because if he happen to die first, all his estate and interest goes from his representatives to the survivor, unless it be construed a severance.

A mortgage severs the joint-tenancy of the trust of a term. Eq. Ab. 293. p. 1. S. C.

11. Duke Hamilton *contra* Lord Mohun.

[20 Maii, 9 Ann.]

ONE of the marriage-articles was, That the intended husband should within two days after the marriage, for the peace of the family, release the guardian of the young lady (the Lady *Gerard*) of all accounts of the mean profits of an estate that belonged to the lady. *Et per Cowper*, Lord Chancellor, Admitting there was no surprise or concealment, yet this covenant ought to be set aside as extorted from the husband, who could not have the daughter but upon these terms; and that wherever a mother, or father, or guardian insists upon private gain, or security for it, and obtains it of the intended husband, it shall be set aside; for the power of a parent or guardian ought not to be made use of to such purpose: You shall not have my daughter unless you do so and so, is to sell children and matches. And he held these contracts with the father, &c. to be of the same nature with brokerage-bonds, &c. but of more mischievous consequence, as that which would happen more frequently; and that it is now a settled rule, That if the father, on the marriage of his son, take a bond of the son, that the son shall pay him so much, &c. it is void,

Covenant before marriage to release the wife's guardian within two days after of all accounts of mesne profits, set aside in equity. Eq. Ab. 90. p. 6. S. C. 2 Vern. 500, 658. 1 P. Wms. 118. Gilb. Ch. 297. 10 Mod. 447.

void, being done by coercion while he is under the awe of his father (a).

(a) The cases in which Courts of Equity will relieve against unequal contracts on principles of public policy, arising either from the subject matter of the contract, or the relative situations of the contracting parties, are stated by Mr. Coxe, in a note to *Osmond v. Fitzroy*, 3 P. Wms. 131.

The following decisions have taken place on points similar to that in the text: *Pearce v. Waring*, cited in *Hylton v. Hylton*, 2 Vez. 547. The defendant having been guardian to A., by A.'s directions, immediately upon his coming of age, invested a considerable sum of A.'s money in the purchase of stock in the defendant's name, which A. soon after confirmed to the defendant by deed of gift. The deed was set aside. So in *Hylton v. Hylton*, where the defendant was acting executor in a will under which the plaintiff was entitled to considerable property, and soon after the plaintiff's coming of age he granted to the defendant an annuity of 60*l.*, gave him a general release, and two written discharges, upon his delivering up several papers. The Court set aside the

grant, and directed a conveyance and account. The same principle is applied to transactions of other persons between whom a similar confidence has existed as in the before-mentioned case of *Osmond v. Fitzroy*, where the defendant having been employed as servant to attend upon A., then an infant about seventeen, to prevent his being imposed upon, and continued in A.'s service afterwards, when A. was about twenty-seven years of age, prevailed upon him to give a bond, which was kept secret from A.'s friends, and there were some proofs of the weakness of A.'s capacity. *Griffin v. Devuille*, cited in Mr. Coxe's note to *Osmond v. Fitzroy*, where the plaintiff lived some time before he came of age with his sister and her husband, and the Court set aside securities obtained from him by them on his coming of age. The following cases have been decided on the same ground between parent and child; *Gliffon v. Okeden*, 2 Atk. 258. 3 Bro. P. C. 560. *Young v. Pear*, 2 Atk. 266. *Cocking v. Pratt*, 1 Vez. 400. *Hawes v. Wyatt*, 3 Bro. Cb. 156.

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12. Corbett & Ux. contra Maidwell.

[Trin. 9 Ann. In Cancell.]

A term limited in remainder after the father's death, in trust for raising daughters' portions at such an age or marriage, when either happens the portions may be raised in the father's lifetime. Eq. Ab. 337. p. 5. S. C. 2 Vern. 640, 655. 3 C. R. 290.

A Bill was brought for raising the wife's portion out of a reversionary term expectant on her father's death: The case was, *Thomas Maidwell*, the father of the plaintiff's wife, upon his marriage, settled to the use of himself for life, remainder to trustees for 500 years, remainder to the heirs male of his body by his intended wife, and if he should happen to die without issue male of his body by his wife, and there should be one or more daughters of their two bodies, which should be unmarried, or not provided for at the time of his death, such daughter (if but one) should have 2000*l.*, and 30*l.* per annum issuing out of the profits till the portion should become due; the portion to be payable at the age of eighteen, or day of marriage, and a power

power for the trustees to raise it by sale or mortgage of the term, or perception of profits. There being but one daughter of this marriage, and no son, the wife died, and the daughter being above the age of twenty-one, and married to the plaintiff, the question was, Whether the trustees could raise her portion in the life of her father? And on great consideration it was held by the Lord Cowper, Lord Chancellor (a),

1st, That though a term is limited, in remainder to commence after the death of the father, yet if the trust is to raise a portion payable at the age of eighteen, or day of marriage, without question the daughter shall not wait the death of her father, but at the age of eighteen, or marriage, may compel a sale of the term.

2dly, So it is if the trust of a term for raising daughters' portions be limited to take effect, in case the father dies without issue male by his wife, and the wife die without issue male, leaving a daughter, in such case the term is saleable in the life of the father.

So if on contingency, and the contingency happens in the life of the father.

That so far it had been carried already, but he doubted whether he could have gone so far in case the matter were *res integra*; but that the reasoning upon which it had been founded was, that by the death of the mother the possibi-

(a) Though the doctrine mentioned at the beginning of the case, and established in the cases of *Greaves* and *Maddison*, and in *Gerard v. Gerard*, 2 Vern. 458. are received as law, the inclination of the courts has been, ever since the case of *Corbett* and *Maidwell*, against raising portions in the life of the father; and they have endeavoured, if possible, to distinguish cases from the general rule; as in *Butler v. Duncombe*, 1 P. Wms. 448., where the trust was to raise portions after the commencement of the term. So *Churchman v. Harvey*, Amb. 335. *Reresby v. Newland*, 2 P. Wms. 93. 2 Bro. R. C. 487. where the portion was to be paid at eighteen or marriage, or as soon after as it could be conveniently raised; and there was a proviso, that if the father should die without any daughter living at his decease, the term to be void, and a power with the trustees' consent to revoke the uses. *Brome v. Berkley*, 2 P. Wms. 484. 3 Bro. P. C. 437. where lands were limited to the husband for life, remainder to the wife for life, remainder

to sons in tail, remainder to trustees, in case there should be no son, to raise a portion payable at twenty-one or marriage, with a maintenance in the mean time, the first payment whereof to be made on the first of certain feasts which should happen after the estate limited to the trustees should take effect in possession. *Stephens v. Dethick*, 3 Atk. 39. where it was provided that the daughters should, out of the premises comprised in the term, receive a yearly maintenance, and that the residue of the rents should, in the mean time, till the portions became payable, be received by such persons as should be entitled to the reversion immediately expectant upon the determination of the term. *Vide Sandys v. Sandys*, 1 P. Wms. 707. *Hebblethwaite v. Cartwright*, Ca. temp. Talb. 31. *Stanley v. Stanley*, 1 Atk. 549. *Hall v. Carter*, 2 Atk. 354. *Goodall v. Rivers*, Mos. 395. *Lyon v. Duke of Chandos*, 3 Atk. 416. *Smith v. Evans*, Ambler 633. *Conway v. Conway*, 3 Bro. Cb. 267.

lity of issue male was extinct : That all that was contingent in the case has happened : It is become impossible that there should be issue male ; and as to the father's death, that is not contingent, for all men must die ; and it is now the same thing to say, when the father shall die without issue male by his wife, as to say when the father shall die.

And if this case had gone no farther, it had been no more than that the father is tenant for life, remainder to trustees for 500 years for raising daughters' portions payable at the age of eighteen, or marriage ; and now all contingencies having happened, and being out of the case, it should seem within the reason of the first resolution.

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That the case of *Greaves and Mattison*, 2 Jo. 201. comes fully up to this resolution : Sir *Edward Greaves* made a settlement to the use of himself for life, remainder to the use of his first son in tale male, remainder to trustees for forty years, remainder to himself in fee : The term is declared to be in trust, that in case it should happen that the said Sir *Edward* should die without issue male of his body, then the trustees should raise 5000 *l.* for daughters' portions payable at the age of twenty-one, or marriage, with a provision for maintenance in the mean time. The wife died, leaving two daughters, and no issue male ; and by *Pemberton, Dolben, and Raymond*, it was resolved, that the right to the portion was vested by the mother's death without issue male, in the life of the father ; for otherwise the father might live so long that the portions might be of little service.

Ca. t. mp. Talb.
31.

Thus far the Court has gone for convenience, that young women may have their portions when they most want them.

But not before
the contingency
happened.

But in the principal case, the daughter, who is the subject of this provision, must be a daughter unmarried or unprovided for at the time of the father's death, which is a contingency not yet happened, and therefore it comes not within the reason of either of the rules.

As to the 30 *l. per annum* for maintenance, he held, that must be intended in case the father die without issue male, leaving a daughter under the age of eighteen, or not married, because otherwise this absurdity must follow, that the daughter must be paid maintenance-money in the life of the father, out of the profits of a term that is not to commence till after the father's death.

1 Salk. 159.
S. C. 2 Vern.
640. S. C.
3 Chan. Rep.
640. S. C.

That this case was too strong for the Court to attempt to get over, and to do it would create great confusion ; and it would be to no purpose for any one to make deeds, if the argument of convenience or inconvenience should prevail to over-rule them. Bill dismissed.

13. *Whitecomb contra Jacob.*

[Triu. 9 Ann. In Canc.]

IF one employs a factor, and entrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted (*in*) to debts of a higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c. for in regard that money has no earmark, equity cannot follow that in behalf of him that employed the factor (*a*).

Merchant's goods in the hands of the factor not liable to debts of a superior nature; otherwise of money. 2 Vern. 638.

Not so
[161] *The Hall*
LR13 ChD71

(*a*) The principles of this case have been confirmed and extended by the following authorities: concerning which it is to be observed, that every decision arising upon the bankruptcy of the party entrusted is applicable *a fortiori* to other contingencies, on account of the provision in stat. 21 Jac. 1. c. 19. s. 10, 11. concerning bankrupts having goods, &c. in their possession by consent of the true owner. *Copeman v. Callant*, 1 P. Wms. 314. 2 Eq. Ca. Ab. 113. Goods assigned by A to C. in trust, to pay A's debts, are not affected by the bankruptcy of C. *Per* Ld. Mansfield; *Howard v. Jemmett*, 3 Bur. 1369. If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator, not even money which can specifically be distinguished and ascertained to belong to such testator. *Per* Buller J. *Rex v. Eggington*, 1 T. R. 369. If a sum of money, collected by an overseer who became bankrupt, had been kept by itself, the

assignees could not have touched it. *Per* Ld. Ch. King, *Godfrey v. Furze*, 3 P. Wms. 185. A factor to whom goods are consigned has no property in them, nor will they be affected by his bankruptcy. *Zinck v. Walker*, 2 Bl. Rep. 1154. Bills of exchange sent to an agent or banker to indemnify him against acceptances, ruled to be the same as goods consigned to a factor. *Vide*, as to that point, *ex parte Dumas*, 1 Atk. 232. 2 Vex. 582. *ex parte Ourfill*, *Ambler* 297. *ex parte Emery*, 2 Vex. 674. *dict.* that where a note has been taken for the money [on goods sold by a factor who became bankrupt], the Court followed the note. *Farr v. Newman*, 4 T. R. 621. Goods in the hands of an executor cannot be taken in execution for the executor's own debt. *Miller v. Race*, 1 Bur. 457. On bankruptcies, *bank notes* cannot be followed as identical and distinguishable from money, but are always considered as money or cash.

14. *Vane versus Lord Bernard.*

[Mich. 1 Georg. In Canc. S. C. Prec. Ch. 454. Gilb. Ch. 193.
1 Eq. Ab. 400.]

LORD Bernard upon his marriage, in consideration of a portion of 10,000 l. settled the castle of *Raby*, &c. to the use of himself for life, without impeachment of waste,

Injunction to prevent the pulling down a castle granted against

tenant for life,
disfranchisable of
waste. 2 Chan.
Cas. 32.
2 Vern. 738.

waste, remainder to his son for life, &c. The son brought a bill against his father the Lord *Bernard*, to enjoin him from pulling down the castle; and *Cowper*, Lord Chancellor, granted an injunction, because this was an abuse of the power, and derogatory to the grant; the intent of that privilege being only in order to cut down timber, and open new mines (a).

(a) *Vide* *Proc. Ch.* 454. 1 *Brown.* 107. 1 *P. Wms.* 526. 2 *Bra.* 88. 166. 1 *Vern.* 23. 1 *Rel.* 379. 3 *Alt.* 22 *Vin. Ab.* 420. 215, 219. 1 *Vex.* 264, 521. *Amblar*

Chaplain.

Brown *versus* Mugg.

[Mich. 12 W. 3. B. R. 2 Ld. Raym. 791. S. C.]

King's chaplain
extraordinary is
not capable of a
plurality within
21 H. 8. c. 13
& 14. 3 Salk.
389. 8 C. Holt
137.

2 Brown. 45.
Dispensation is
not necessary
where the king
presents his
chaplain to a se-
cond benefice.

TRESPASS for taking his tithes in *Inkborow*. By a special verdict it was found, that the defendant being possessed of the benefice of *Stockton*, and a chaplain extraordinary to the king, was presented, instituted, and inducted to the rectory of *Inkborow*, being above the annual value of 8 *l. per annum*; that the benefice of *Stockton* did thereby become void, and continued so for two years, when the defendant was presented to it again by the king, as upon a title of lapse, and thereupon instituted and inducted; and that *Stockton* was above the value of 8 *l. per annum*. *Et per Cur.* 1st, A presentation of the king of his own chaplain does import a dispensation which the king himself, as supreme ordinary, has a power to grant, and he shall have the benefit of holding a plurality without any previous dispensation: But if the king's chaplain be presented to a second benefice by a subject, a dispensation is necessary, and must be obtained before his institution to the second living. 2dly, A chaplain extraordinary is not a chaplain within the benefit of the statute of the 21 H. 8. c. 13 & 14. but only the chaplains in ordinary. Judgment for the plaintiff, which was affirmed in *Cam. Scacc.* by a majority of one. *Note*, He has no waiting time, but has only an entry of his name in the book of chaplains.

chaplains. A chaplain within the 21 H. 8. ought to be retained under seal. 3 Cro. 424. Godb. 41. If the king have a special title, and present generally, it is void. Hob. 302. *Et per Holt*, After institution and induction a presentation by the king is void, though it be *ad corroborandum*; but he must obtain a patent of express grant.

Charitable Uses.

1. Dominus Rex *versus* Lady Portington.

[4 W. & M.]

ON a traverse to an inquisition *post mortem Anne Barlow*, the jury found for the king, by reason the said *Anne* had devised her land to superstitious uses; but a case was made as followeth:

Anne Barlow devised to the Lady *Portington* and her heirs, absolutely without any trust; that she did it for the good of her soul, and that the devisee owned that this estate was not her's, but belonged to God and his saints. The question was, Whether this devise could be averred to be in trust to a superstitious use? And the Court of King's Bench held it could not, and that both from the statute of frauds, and from the nature of the thing. Supposing the devisee was a nun, it was considered how the law was then; and the Court held, that a monk now might purchase, because that part of the canon law, whereby his disability arose, is now abolished, and the common law takes no notice of him.

After this, *viz.* 26 May 1693, an information was preferred in the Exchequer for a discovery, and an application of the devise to an use truly charitable.

And it was held, 1st, That the statute of frauds did not bind the king (a), but took place only between party and party. 2dly, That the king, as head of the commonwealth, is obliged by the common law, and for that pur-

Absolute devise:
No averment
can be admitted,
of trust for superstitious uses,
by statute of frauds. Eq. Ab. 96. S. C.
3 Salk. 334.
Cases B. R. 31.

But discoverable
by information
in Scacc.

Statute of
frauds.

(a) *Vide* 3 *Atkyns* 141, 154. Lord is not bound by a statute unless he is *Hard.* there expressed himself doubt- expressly named. *Vide* 1 *Bl. Com.* 253.

Devise to superstitious uses is void, but neither the heir nor the king shall have it, but the king shall apply it to a charitable use. Mo. 129.

pose entrusted and empowered to see that nothing be done to the disherison of the crown, or the propagation of a false religion, and to that end entitled to pray a discovery of a trust to a superstitious use. 3dly, This use being superstitious, is merely void, and for that reason the king cannot have it (a): Yet however it is not so far void as that it shall result to the heir, and therefore the king shall order it to be applied to a proper use (b).

(a) *Vide acc. Ambler* 228.

wherby *devises* to charitable uses are

(b) But now *vide stat. 9 G. II. c. 36.* void.

2. Mr. Attorney General *contra* Shelly.

[1712. In Canc.]

To a bill for a charitable use, all the tenants need not be made parties.

SIR R. Combe devised an annuity out of his land for the maintenance of *Watford* school; and now upon a bill in Chancery, brought by the attorney general on the behalf of the charity, it was objected, that all the tenants of the lands charged ought to be brought before the Court: *Sed Cur. contra*: For every part of the land is liable, and the charity ought not to be put to this difficulty; but the tenants may, if they seek a contribution, undertake to make them parties to the information, or help themselves by such course as they think fit (c).

(c) *R. acc. 1 Wms. 599. 2 Eq. Ca. Ab. 167. Attorney General v. Wyburgh.*

3. Genner *versus* Harper.

[In Canc. Trin. 1714. S. C. 1 P. Wms. 247. Gilb. Ch. 340. Prec. Ch. 389.]

Devise of lands to charitable uses, not in writing, or without three witnesses, is void. 6 Co. 16. b. Co. Litt. 111. b. 3 Mod. 219, 262, 263. Dr. Johnson's case, 2 Vern. 598.

A Tenant in tail made a nuncupative will, and gave a rent of 20*l. per annum* out of the estate-tail for erecting of a free-school, and ordered that his executors should purchase other lands for the maintenance of the said school: this will was made before the statute of frauds, but the testator died after; and now it was held by *Harcourt*, Lord Chancellor, that at common law lands were not devisable; that the 31 *H. 8* empowers the owner to devise, but as much requires that his will of lands shall be in writing, as the statute of frauds requires his will of lands should have three witnesses; and therefore if such will want but one witness, it is void to all intents and purposes; and the statute of the 43 of *Eliz.* which favoured appointments to charities, is now repealed *pro tanta* by the statute of frauds (d).

(d) *Vide note to R. v. Portington, ante* 162.

Churches. Chapels, Church-wardens.

1. Woodward *versus* Makepeace.

[Intr. Mich. 4. Jac. 2. Rot. 282. Trin. 1 W. & M. B. R.]

WOODWARD, who lived in the diocese of *Litchfield* and *Coventry*, but occupied lands in the parish of *D.* in the diocese of *Peterborough*, was there taxed in respect of his land, as an inhabitant, towards a rate for new-casting of the bells, and, because he refused to pay, was cited into the court of the bishop of *Peterborough*, and libelled against for this matter. *Et per Cur.* 1st, 'This is not a citing out of the diocese, within the statute 32 H. 8. c. 9., for he is an inhabitant where he occupies the land, as well as where he personally resides. *Vide Cro. Jac.* 321. *Cro. Car.* 97.

H. only occupying lands in a parish is taxable to a rate for bells. *Far.* 69, 121, 122. *Vide Poph.* 197. 2 *Brownl.* 10. 3 *Mod.* 211. *S. C. Comb.* 132.

2dly, Though he does not personally live in the parish, yet, by having lands in his hands, he is taxable; and whereas it was pretended the bells were but ornaments, it was held, they were more than mere ornaments; that they were as necessary as the steeple, which is of no use without the bells; and *Holt C. J.* said, If he be an inhabitant as to the church, which is confessed, how can he not be an inhabitant as to the ornaments of the church?

Lat. 103. *Win.* 53. 1 *Bul.* 20. 2 *Ro.* 291. 3 *Cro.* 659. 2 *Ro. R.* 270. 2 *Lut.* 1023. *Cro. El.* 843. pl. 24. and 659. pl. 5.

2. Ball *versus* Cross.

THE inhabitants of a chapelry within a parish were prosecuted in the ecclesiastical court, for not paying towards the repairs of the parish-church; and the case was, those of the chapelry never had contributed, but always buried in the mother-church, till about *Henry* the Eighth's time the bishop was prevailed on to consecrate them a burial-place, in consideration of which they agreed to pay towards the repair of the mother-church; all which appeared upon the libel; and *Holt* Chief Justice held,

Inhabitants of a chapelry are liable to the repairs of the mother-church, unless exempt by custom; not where there is only a late erection. *Holt* 138. *S. C.*

That by common law the parishioners of every parish are bound to repair the church, but by the canon law the

London. 2 *Lev.* 102, 163, 186. 1 *Jones* 89.

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Far. 122. Cam-
ber. 132, 298,
344. 1 Mod.
236. 2 Mod.
223. 2 Rol.
290. l. 22.
Mob. 67.

parson is obliged to do it, and so it is in foreign countries. In *London* the parishioners repair both church and chancel, though the freehold is in the parson, and it is part of his glebe, for which he may bring an ejection.

In the principal case, those of a chapelry may prescribe to be exempt from repairing the mother-church, as where it buries and christens within itself, and has never contributed to the mother-church; for in that case it shall be intended coeval, and not a latter erection in case of those of the chapelry; but here it appears, that the chapel could be only an erection in case and favour of them of the chapelry; for they of the chapelry buried at the mother-church till *Henry* the Eighth's time, and then undertook to contribute to the repairs of the mother-church.

3. *Pierce versus Prouse.*

[Trin. 7 Will. 3. B. R.]

Church-rate to
be assessed by the
parishioners, not
the church war-
dens. 1 Rol.
121. 1 Mod.
236. 2 Mod.
222. Mod.
Cases, &c. 435.
Far. 70. 1 Vent.
167, 367.
Comb. 132. 3 Mod. 211. 2 Inst. 489.

CHURCH-WARDENS assessed a rate for repairs of the church, and after libelled against a parishioner for not paying it. *Et per Cur.* being moved for a prohibition,

1st, The parishioners ought to assess the rate, and not the church-wardens. 2dly, The parishioners are only bound to repair the church and not the chancel, for that it is to be repaired by the parson.

4. *Harman versus Renew.*

[Mich. 7 W. 3. B. R.]

Union of
churches was at
common law,
not of parishes.
3 Salk. 89. 6. C.

ON a motion for a prohibition to a suit in the Consistory Court of *London*, on the stat. 22 *Car.* 2. cap. 11. which unites the parish of *St. Mary Botolph* to the parish of *St. Swithin*, against the parishioners of the parish of *St. Mary B.* to have a contribution to the repair of the church of *St. Swithin*, *Holt* C. J. said, that at common law, by concurrence of parson, patron, and ordinary, churches might be united to one another, but not parishes.

It was said *per Powell* J., in a case in *C. B.*, that union was of spiritual consueance till 37 *H.* 8. c. 21. and then the temporal court took consueance of it; and that the incumbency of the churches united is extinct; but tithes and ~~modus~~ continue afterwards. But *per Treby* C. J. The ancient church or rectory remains not, but this is a new creature,

creature, a new church, a new patronage, a *novum ali-*
quod tertium (a).

(a) *R. Skinn.* 616. that both pa- pair of the church made the parish
rishes shall be contributory to the re- church.

5. Morgan *versus* The Archdeacon of Cardigan. [166]

[Hill 8 Will. 3. B. R. 1 Ld. Raym. 138. S. C.]

MANDAMUS to the archdeacon to swear in a church-warden neing duly elected; the archdeacon made this retort, that he was *pauper lacharius & servus minus habilis, &c.* and thereupon a peremptory *mandamus* was awarded; for the church-warden is a temporal officer, he has the property and custody of the parish goods, and as it is at the peril of the parishioners, so they may choose and trust whom they think fit; and the archdeacon has no power to elect, or control their election (b).

Return to a
mandamus to
swear in a
church-warden,
insufficient, and
a peremptory
mandamus
granted. Raym.
440. 5 Mod.
326. Comb.
427. Carth.
393.

(b) *Vide Str.* 610.

6. Britton *versus* Standish.

[Hill. 3 Ann. B. R.]

BRITTON was libelled against in the spiritual court by Mr. *Standish* the parson of the parish, for not coming to his parish-church on *Sundays*; to which he pleaded, that he went to another church more commodious for him. Upon this matter suggested, there was a prohibition, and the plaintiff declared therein; and the single question was, Whether he was compellable to go to his parish-church? It was said he was compellable, because every parson was obliged not to allow a parishioner of another parish to partake of sacraments with him. *Vide* 2 *Spel. Conc.* 141. *Lyn.* 184, 233. *Reform. L. Eccl.* 106. *Spar. Coll.* 77, 78, 126, 226, 237, 181, 31. *Rubrick in fine*; and that this is allowed by common law. 2 *Roll. Rep.* 438, 455. *Hardr.* 406, 407. in point, and that the spiritual court is to judge of the excuse. *March* 93. And, by the act of uniformity, every man is required to resort to his parish-church. On the other side it was argued, that the distribution into parishes was by the common law, and that if this distribution did in consequence bring people under a new obligation, such obligation ought to be examinable by the common law; that the statute of uniformity has been always looked upon as suffi-

6 Mod. 188.
Q. Whether H.
be suable in the
ecclesiastical
court for not
going to his pa-
rish-church?
3 Mod. 42, 43.
2 Cro. 480.
1 And. 138.
3 Salk. 188.
S. C. Holt 141.
See the Canons
of the Church of
England 1608.
21, 23, 172.
1 Bulst. 159.

ciently complied with by going to any church, and the 23 *Eliz.* imposes the penalty upon any one that absents from the church, contrary to the 1 *Eliz.*, and that if these acts are construed to give a jurisdiction, that jurisdiction must be to the courts of the common law, and not the ecclesiastical courts.

Entire neglect of going to church, is punishable in the ecclesiastical court.

In this case it was agreed, that every man was obliged to go to some church or other, and that an entire neglect was punishable in the ecclesiastical court; and that it was a good charge *prima facie*, that a man went not to his parish-church, because he shall not be supposed to go to any other: And the Court seemed to be of opinion, that though the act of uniformity be taken to be introductive of a new law, yet the thing being purely of ecclesiastical consequence, and proper for their examination, a consultation ought to go: But there was no resolution (a).

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(a) *N. B.* The Report in *Mod.* plaintiff ordered to declare forthays, a prohibition was granted, and with.

7. *Presgrave versus* The Church-wardens of Shrewsbury.

[Hill. 3 Ann. B. R.]

Parishioners cannot prescribe to dispose of pews, exclusive of the ordinary. 2 *Roll. Rep.* 288. *Poph.* 140. *Raym.* 216, 246. 2 *Lev.* 241. 5 *Mod.* 436. *Hob.* 89.

A Prohibition was prayed to a suit in the spiritual court, where the parishioners prescribed to dispose of the pews, exclusive of the ordinary: *Sed per Cur.* That cannot be (b): The ordinary's not acting might be because there was no occasion for his intermeddling; but that cannot vest the right in them who are only a corporation capable of goods, but not of inheritance. *Sed adjournatur.*

March. 66. 2 *Jon.* 30. 4. *Noy* 104. *Sid.* 88, 89. 1 *Lev.* 71.

(b) *Vide Gibson* 198. *Roll. Rep.* 24. *contra*, on shewing ground of prescription.

Church of England. Religion, Dissenters, &c.

Rex & Regina *versus* Larwood.

[Hill. 6 W. & M. B. R. 1 Ld. Raym. 291. S. C.]

AN information was exhibited against the defendant for neglecting and refusing to take upon him the office of sheriff of *Norwich*, setting forth the charter of *H. 4.*, whereby that city is made a county, and to have two sheriffs to be chosen by the commonalty, and also the charter of *Car. 2.* confirming the former, but granting farther, that one sheriff shall be chosen by the mayor, sheriffs, and aldermen only; and that the defendant being chosen by the mayor, sheriffs, and aldermen, had notice, but did not appear nor take the oaths, nor take upon him and execute his office. The defendant pleaded the statute 13 *Car. 2.* and that he had not qualified himself by taking the sacrament according to the usage of the church of *England*, within a year before the election. The attorney general replied, that by law he ought to have done it. The defendant rejoined, the act of * toleration, and that he was a protestant dissenter, and excused by that statute; and thereupon there was a demurrer.

4 Mod. 269.
S. C. Dr. Sacheverell's Trial, 274. octavo.
Information for refusing to take upon him the office of sheriff, adjudged, That Dissenters are not exempt by the toleration act, from doing acts necessary to qualify themselves for offices, according to 13 *Car. 2.* stat. 2. c. 1. (3 Salk. 134. Skin. 574. Carth. 306. Holt 505. Comb. 315. 2 Vent. 248. Cases B. R. 67.

S. C.) 2 Strange 1193, seems contra. Andrews' Rep. 201, margine. The King *versus* Shackington, 2 Quaker. 2 Mod. 299.

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All the judges concurred; first, That the rejoinder was a departure, because it did not fortify the plea, and should have been pleaded at first, when he had an opportunity, and might have done it.

Departure.

2dly, That the toleration act is a private statute (*a*), and the Court cannot take notice of it, unless it be pleaded; and the reasons are, first, because time out of mind there was an established church of *England*, and an established discipline in the church, which all persons were bound to observe before the reformation. *Vide Lyn. 8.* And all persons are obliged to do so by the statute of *Ed. 6.* and *Q. Eliz.*, and the law took no notice of the dissenters till

Toleration act is a private stat.

(*a*) By stat. 19 *Geo. 3.* ch. 44. declared to be a public act.
the toleration act is enacted and

this

this act. 2dly, Because the act does not extend to all dissenters, but only to such dissenters as go to the quarter-sessions, and take and subscribe the declaration.

In the rest of this case the Court differed; *S. Eyre*, Justice, held, 1st, The mayor, sheriffs, and aldermen had no power to make such election, because the charter granted by *Hen. 4.* to the commonalty could not be divested, but by surrender or by forfeiture. 2dly, Because the defendant was rendered incapable by the 13 *Car. 2.* and ought not to be twice punished, viz. lose his office by virtue of the statute, and be punished at common law by judgment in this information: And he relied on a case which is now published in 2 *Vent.* 247.

G. Eyre and *Holt C. J.* contra; they held the election good, notwithstanding the charter of *H. 4.* not that the king can resume an interest he has already granted, unless the grantee concur; but in this case the corporation had concurred, by accepting a new charter, which, it is true, they may use as a new grant or confirmation; but in this case, having made their elections according to the method prescribed by the new charter, it is evidence of their consent to accept it as a grant. *Vide* 2 *Cro.* 313. 21 *H.* 7.

Also they held the design of the 13 *Car. 2.* was not to exempt any person from executing or serving in any office to which he was obliged before, but to qualify him for executing offices; for the act intended to discourage dissenters, and not to favour them; whereas, if this plea should be allowed, the act would enure to their advantage.

That the king hath an interest in every subject, and a right to his service, and no man can be exempt from the office of sheriff, but by act of parliament or letters patent. *Vide Mo.* 111. *Sav.* 43. 9 *Ca.* 46.

Lastly, No man can take advantage of his own disability: No man can plead he is a fool, or *non compos*; but if a *non compos* is indicted, the judges must acquit him *ex officio*, for the king takes care of all such persons; but if a man is disabled by judgment to bear an office, he is excused, *nam judicium redditur in invitum*; yet where he may remove the disability, as in case of excommunication, he shall take no advantage of his disability; so in this case: For which reason judgment was given against the defendant (a).

A new charter may be used as a new grant, or a confirmation.

2 *Vent.* 248. King hath a right to the service of his subjects. None can be exempt from the office of sheriff, but by stat. or charter.

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Co. Lit. 247. a. 1 *Leon.* 466.

(a) *Harrison*, chamberlain of *London*, v. *Evans*. To an action for a penalty for not serving the office of sheriff, the defendant pleaded the corporation and toleration acts; that the office of sheriff was within the former act, and that he had not, within one

year next before the election, taken the sacrament; nor had ever, nor could he in conscience take the same, of which the electors had notice at and before the time of the election; and that by reason of the premises, and by force of the corporation act, they were

were prohibited from electing him to the said office, and he was disabled and utterly incapable of being elected, and thereby the supposed election was utterly void. This plea being overruled in the City Courts, the defendant obtained a special commission of errors, upon which judgment was given in his favour; and on a writ of error in parliament, a question was put to the judges, "Whether the de-

fendant was at liberty, or should be allowed to object to the validity of his election, on account of his not having taken the sacrament within a year before, in bar of the action?" And the majority of the judges being of opinion in the affirmative, the judgment given by the commissioners' delegates in favour of the plea was thereupon affirmed. 6 Bro. Parl. Ca. 181. cited Cowp. 392.

Common.

1. *Rex versus Fox.*

[Mich. 6 W. & M. B. R.]

THE inhabitants of one parish had common appendant in certain waste grounds which lay in another parish; and the question was, Whether the commoner should pay taxes for this, and should be assessed in the parish where the waste lay, or in the parish where his farm lay? And it was held, that he ought to be assessed where his farm lay; for it is incident, and will pass by the grant of the farm, &c. So that it is to be considered as a part of the farm, and the farm to be taxed the higher.

Farmer ought to be taxed for common appendant in the parish where the farm lies.

Vide Loft. 77.
Cowp. 481.
2 T. R. 660.

2. *Emerton versus Selby.*

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1015. S. C.]

REPLEVIN. The defendant avowed for damage-tenant in his freehold: Plaintiff pleaded in bar, that he was seised of a cottage, and prescribed to have common in the defendant's land for all beasts levant and couchant, as appendant to his cottage. This was held good upon demurrer, for a cottage contains a curtilage, as to this; and the statute *de extentis manerii* says, a cottage contains a curtilage, and we will suppose a cottage has at least a court-yard to it: Also a cottage by the statute ought to

H. may prescribe for common appendant to his cottage. 1 Bull. 50. 3 Keb. 44. S. C. 6 Mod. 114. Anonymous. 2 Brownl. 101. Vaugh. 253. Holt 174. 2 Jon. 227.

*Scholes v. Har-
greaves*, 5 T. R.
46.

have four acres of land: And *Holt*, C. J. said, he remembered the trial of an issue, whether levant and couchant, before C. J. *Hale*, who held the foddering of the cattle in the yard evidence of levancy and couchancy. *Vide Co. Lit. 5. Co. Ent. 649.*

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3. Crowder *versus* Oldfield.

[Hill. 4 Ann. B. R. 2 Ld. Raym. 1225. S. C. but not S. P.]

6 Mod. 19.
Post 364. How
copyholder shall
make title to
common within
or without the
manor. Qu.
Hob. 86.
Cro. Jac. 253.
Yel. 189, &c.
4 Co. 31.
3 Salk. 13. S. C.
1 Lutw. 125.
N. L. 46. *Holt*
146. *Lex Man.*
Ap. 130. 2 Rol. 61. l. 5. 1 Bul. 2.

COPYHOLDER, that has common of pasture in the wastes of the lord out of the manor, has the same as belonging to his land; and if he infranchise the copyhold-estate, still his common remains. To this he makes his title in pleading in the lord, *viz.* That the lord of the manor, time out of mind, had common in such a place for himself, and his customary tenants. *Vide Co. Ent. 9, 20.* But where a copyholder has common in the wastes within the manor, that belongs to his estate; and if the estate be enfranchised, the common is extinct. So held in this case, which see at large, *tit.* Jeofails.

Condition.

1. Thomas *versus* Howell.

[Trin. 4 W. & M. B. R.]

Condition made
impossible by
act of God.
Co. Lit. 206. a.
4 Mod. 66. S. C.
Skin. 301, 319.
Holt 225.

ONE devised to his eldest daughter, upon condition she should marry his nephew on or before she attained the age of twenty-one. The nephew died young, and the daughter never refused, and indeed never was required to marry him. After the death of the nephew, the daughter being about seventeen, married J. S. And it was adjudged in *C. B.* that the condition was not broken, being become impossible by the act of God; and the judgment was afterwards affirmed in error in *B. R.*

2. Anonymous.

[Mich. 9 Will. 3. C. B.]

CONDITION was to make the obligee a lease for life by such a day, or pay him 100*l.* Obligee died before the day, and adjudged that his executor shall have the 100*l. per Treby*, C. J., and the ground of *Laughter's* case was denied to be universal.

his executors shall have the 100*l.* Co. Litt. 222. b. 2 Co. 20. 2. Yelv. 178. Moor 472. 2 Dan. 88. pl. 11, 12. 3 Mod. 232.

Ray. 373.
2 Jon. 172.
5 Co. 22. Con-
dition to make
A. a lease for
life, or pay him
100*l.* A. dies;
178. Moor 472.

3. Thorpe *versus* Thorpe.

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[Pasch. 13 Will. 3. B. R. Rot. 253. Comyns 98. S. C. 1 Ld. Raym. 235. S. C. 1 Ld. Raym. 662. Pleadings. Lutw. 245. 3 Ld. Raym. 341.]

IN an action upon the case, the plaintiff declared of a *colloquium* concerning a mortgage, whereupon the plaintiff agreed to release his equity of redemption in two closes, and in consideration thereof the defendant promised to pay him 7*l.*, and to acquit him of all money due on the mortgage; and that the defendant, in consideration of the said agreement, and that the plaintiff had promised to perform every thing on his part, promised to perform every thing on his part. *Et in facto dicit*, that though he had performed all on his part, the defendant hath not paid him the 7*l.* The defendant pleaded, that after the promise made, the plaintiff gave him a release of all actions; the plaintiff craved *oyer* of the release, and by the *oyer* it appeared to be a release of the equity of redemption, and hereupon the plaintiff demurred; and the Court held, that the plaintiff was not entitled to the 7*l.*, nor to an action for it, until he made a release of the equity of redemption, and therefore the promise being not broken at the time of the release, is not discharged by the release, though it be a release of all demands. *Vide Cro.* 171. 5 Co. 70. And as to the mutual promises, the Court said, they related to an agreement, which makes the release a condition precedent (a). And *Holt*, Chief Justice, laid down this rule,

Condition prece-
dent. Lut. 249.
Mod. Cases, &c.
42. 1 Mod. 64.
2 Mod. 33, &c.
1 Sid. 464.
2 Saund. 155,
166. 2 Keb.
674. 1 Lutw.
245. S. C.
Nell. L. 75.
Cases B. R. 455.
Holt 28, 96.



Release of all de-
mands will not
release a promise
unbroken, or
future act.
2 Cro. 300.
Yelv. 214.
Cro. El. 897.

That

(a) In the case of *Kingston* against *Preston*, cited in *Jones v. Berkley*, Doug. 688., Lord *Mansfield* expressed himself to the following effect: There are three kinds of covenants; 1. Such as

are mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is

no

Agreement that A. shall do, and for the doing B. shall pay; the former is a condition precedent. *Farr. 11.*

That in executory contracts, if the agreement be, that the one shall do an act, and for the doing thereof the other shall pay, &c. The doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money, till the thing be performed for which he is to pay (a). *Vide 15 Hen. 7. 10 b. 1 Vent. 177, 214.* But upon this rule he took these diversities:

But time fixed for payment will vary the construction. *Lat. 250.*

1st, If a day be appointed for payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done; for it appears the party relied upon his remedy, and intended not to make the performance a condition precedent. *48 E. 3. 2, 3. 7 Co. 100. b. 1 Vent. 147. 1 Saund. 319.*

Condition to be construed from the intent of the parties.

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2 Leon. 211, 212. 3 Leon. 219. *Cra. Cas. 515. Latw. 245. Ante 113. Hob. 41, 42.*

2dly, Where a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract, in such case performance is a condition precedent, and must be averred in an action for the money, and so is *1 Jones 218.* to be understood. *Vide Dyer 76. pl. 30. contra, and 1 Ro. 414, 415.* But these, and some other books which are contrary, are not law; for every man's bargain ought to be performed as he intended it: When he relies upon his remedy, it is but just that he should be left to it according to his agreement; but on the contrary, there is no reason a man should be forced to trust where he never meant it: And therefore if two men should agree, one, that the other should have his horse, the other, that he will pay 10*l.* for him, no action lies for the money till the horse be delivered. *Vide Dyer 30. pl. 203. 2 Mod. 33.* was denied. Judgment *pro quer.* in *C. B.*, and now affirmed upon a writ of error in *B. R.*

no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of the other, and therefore till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time, and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement,

and may maintain an action for default of the other, though it is not certain that either is obliged to perform the first act. — His Lordship then proceeded to say, that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance.

(a) *Vide Ca. temp. Talb. 164. 1 T. R. 645. 1 Roll. 414. l. 25 to 35. 1 Str. 458, 569, 571. 2 Burr. 900. 4 T. R. 761.*

Vide

Vide the case of *Callonel* versus *Briggs*, tit. *Bargain and Sale of Goods*, pl. 1. (a)

(a) *Vide* 2 *Mod. Caf.* 68, 381. 5. 3d edit. p. 356.
Com. Dig. Pleader, c. 51. *et seq.* vol.

4. Pullerton *versus* Agnew.

[Trim. 2 Ann. B. R.]

S*CIRE facias* against bail reciting a recognizance taken in the time of the late king *William* 3., wherein the condition was, that the defendant should render his body *prisona mar. marescb. domine regina nunc*. It was urged, that the condition was impossible, and in consequence the recognizance single. *Et per Holt* C. J. Where the condition is underwritten or indorsed, there that is only void, and the obligation is single; but where the condition is part of the lien itself, and incorporated therewith, if the condition be impossible, the obligation is void; and the Court inclining that it was ill, the plaintiff prayed his writ might be abated for his own expedition.

Void condition makes the lien void, where it is part of it; otherwise where it is indorsed or underwritten.
Co. Lit. 206.
1 Leon. 189.
Holt 148. S. C.

5. Archbishop of Canterbury *versus* Willis.

[Mich. 6 Ann. B. R.]

IN an action of debt upon a bond, with condition to make an inventory, and exhibit the same into the ecclesiastical court before such a day, it is not enough for the defendant to plead, that there was no court held, but he must plead also, that he was there ready, &c., for he must shew he has done all that could be done on his side towards a performance. Thus, if the condition of a bond be to levy a fine *in octabis Sancti Hillarii*, by which condition the plaintiff is to sue out the writ of covenant, it is not enough for the defendant to plead, that no writ of covenant was sued out; but he must plead, that he was there ready at the day, &c., and no writ of covenant was sued out: and so if one be bound to pay money to J. S. at a certain time and place, it is not enough for the defendant to say, that the obligee came not, without saying, that he was there ready. *Per Holt*, Chief Justice, in the resolution of this case, which see at large, *tit. Executors*,

Post 214, 315.
Condition to exhibit an inventory into the spiritual court before such a day; defendant, in excuse, must not only plead that no court was held, but also that he was there ready.

Confession.

1. Jones *versus* Bodinham.

[Trin. 8 Will. 3. B. R. 1 Ld. Raym. 90. S. C. Com. 8. S. C.]

Verdict for the plaintiff set aside, and judgment entered by confession upon the matter of the plea. Ante r. S. C. 5 Mod. 310, 225. Comb. 379. Carth. 370. Holt 149. Repleader. Cro. El. 318. Mod. Cases 2, 3, 10. 3 Cro. 52. 1 Leon. 78. 1 Lev. 32. 2 Lev. 135. 2 Will. 81.

TRESPASS for taking his cattle in *A.* Defendant justified a taking in *B.* by process with an impossible *teste, virtute cuius* he took them, and traversed the taking in *A.* Upon this traverse issue was joined, and found for the plaintiff, and damages assessed. It was objected in arrest of judgment, that this issue was immaterial, for it is all one where the defendant took them, since he took them without warrant, the process being void; *quod fuit confessum*. It was moved then for a repleader. *Et per Holt, C. J.* A repleader cannot be where there is a trespass confessed. And the verdict was set aside, and a writ of inquiry awarded, because the issue being immaterial, the jury had no power to inquire of damages: And judgment was entered for the plaintiff on the confession, and not upon the verdict. *Vide Mo. 696. Tel. 89. 1 Cro. 25, 214. Hob. 327. 2 Ro. 99. 3 Cro. 722, 778, 227, 214, 445. 2 Cro. 678. 1 Saund. 128. Ray. 458. (a)*

2. Staple *versus* Haydon.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 922. S. C.]

6 Mod. 1. S. C. 3 Salk. 121. Holt 217. Post 216. After a frivolous plea, judgment may be entered as by confession; otherwise if only mispleaded. 2 Salk. 579. S. C. Mod. Cases 10. Hob. 69. 1 Sand. 318.

WHERE the defendant pleads an ill plea, but the matter, if well pleaded, might have amounted to a good bar or justification, judgment can never be given against the defendant, as by confession; but where the matter, though never so well pleaded, could signify nothing, judgment may in such case be given as by confession; as if in case for calling him thief, the defendant should justify, for that he received a thief. *Dit per Holt C. J.* in the resolution of this case, which see at large, *Tit. Default (a).*

(a) *Vide acc. 1 Bur. 301. in Str. 394. Corup. 510.* It is laid down that the Court will not award a repleader in any case but where complete justice may be answered. *Vide also Str. 873, 994.*

Conspiracy.

Domina Regina *versus* Best & al.

[Trin. 3 Ann. B. R. 2 Ld. Raym. 1167. S. C. 3 Ld. Raym.
Entries 53.]

INDICTMENT was, That the defendants, intending to oppress and defame *H.*, did falsely and maliciously contrive, conspire, meet, and agree falsely to charge the said *H.* to be the father of a bastard-child, of which such a woman went big; and in pursuance thereof did falsely affirm him to be the father. Upon demurret it was urged, that *H.* might be the father, because it was not averred that he was not the father. It was agreed by the Court, 1st, That several people may lawfully meet and consult to prosecute a guilty person; otherwise if to charge one that is innocent, right or wrong, for that is indictable (*a*). That so it is here, that the conspiracy is the gist of the indictment, and that though nothing be done in prosecution of it, it is a complete and consummate offence of itself; and whether the conspiracy be to charge a temporal or ecclesiastical offence on an innocent person, it is the same thing. 2dly, It need not be averred that *H.* is innocent, for it is said, that the defendant did falsely affirm him to be the father, and innocence is to be intended till the contrary appears (*b*). *Vide 2 West's Prec. pl. 102. 42 E. 3. 14.* The *venue* must be where the conspiracy was, not where the result of the conspiracy is put in execution: And confederacies are one of the articles in the commission of *oyer* and *terminer*, to be inquired of.

Holt 151. S. C. Conspiracy, tho' nothing be done in pursuance of it, is an offence; and that whether it be to charge with a offence temporal or ecclesiastical.
8 Mod. 321. S. C. Mod. Cases 137, 169, 185. 2 Mod. 152, 306.
9 Co. 53. Hob. 219. 1 Keb. 233, 234. 2 Keb. 59.
1 Vent. 304, 305. Confederacies, one of the articles of *oyer* and *terminer*.

(*a*) 3 Bur. 1320. Bl. Re. 368.

(*b*) R. 2 Bur. 993. That it is not necessary to allege that defendants conspired *falsely* to indict, &c.

Constable.

Post 380. Rep.
A. Q. 43. S. C.

THE high constable was an officer at common law before the statute of *Winton*, as well as petit constable, and they are officers to the justices of peace, as the sheriff is to the court of King's Bench. *Per Curiam*, in the case of the Queen and *Wyat*, which see *tit. Indictment*:

L. Fletcher *versus* Ingram.

[Hill. 2 Will. 3. B. R. Intr. Mich. 7 Will. 3. Rot. 107.
1 Ld. Raym. 69. S. C. with other points.]

Constable chosen at the leet, bound to serve under a penalty, but that cannot be distrained for without express custom. 5 Mod. 127. 1 Mod. 13. 2 Salk. 501. 2 Roll. Abr. 535. pl. 1, 2. 1 Roll. Abr. 541. pl. 5. 1 Bulst. 174, 176. Comb. 350. S. C. Skin. 635. Holt 187. Cases B. R. 87. Lilly Entr. 369.

REPLEVIN for taking his mare; the defendants made confession, that the *locus in quo* is within the manor of *Shrewston*, where there is a court-leet, and that the jury of the said leet, time out of mind, have chosen one of the inhabitants within the manor to be constable, and that the person so chosen, by the said custom, is to serve, or forfeit a reasonable penalty, to be imposed by the jury at the said leet; that the plaintiff was elected accordingly, and ordered to take upon him the office under the pain of 40 s., and thereof had notice, but neglected; which was presented at the next leet, and he had thereby forfeited 40 s., for which the defendants, as bailiffs to the lord, took the distress. *Et per Cur.* (upon demurrer) Of common right the constable is to be chosen by the jury in the leet, and if the party chosen be present, and refuse, the steward may fine him; if absent, the homage must present his refusal at the next court, and then he shall be amerced; also if the party chosen be present, he shall take the oath in the leet; if absent, before the justices of peace, who still administer the oath to him as conservators of the peace at common law: But a custom ought to be alleged for distraining for the penalty; and judgment was given for the plaintiff.

2. Case of the Village of Chorley.

[Trin. 11 W. 3. B. R.]

THE village of *Chorley* having no constable, the justices of peace, by order of sessions, appointed one to serve there. *Et per Holt, C. J.* A constable may be chosen in the tourn or leet. A village and a constable are correlatives, but a hamlet has no constable. The justices have all along exercised a power of appointing constables, and we will intend they have a sufficient authority for it; but the stat. 13 & 14 Car. 2. c. 12. gives them authority to do it only in the particular cases therein mentioned. And as to the authority of a constable out of his parish, the C. J. laid, that if a warrant be directed to the constable *by name* (a), commanding him to execute it, though he is not compellable to go out of his own precinct, yet he may if he will, and shall be justified by the warrant for so doing; but if the warrant be directed to all constables, &c. generally, it shall be taken respectively, and no constable can execute the same out of his precinct.

Sessions of the peace may appoint a constable. Holt 153 S. C.

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2 Jon. 212. Rep. B. R. temp. Hard. 282.

If a warrant be directed to a constable by name, he may execute it out of his precinct. Carth. 78. 5 Mod. 82.

N. B. Hist. 11 W. 3. held so likewise in the case of the King and *Chandler*. *Ld. Raym. 546.*

(a) In the case of *K. and Chandler*, Lord *Raym. 546.* *Holt* says, "If a justice directs his warrant to a particular constable, he may execute it out of his district," without saying a particular constable *by name*; and the editor, it seems, submits that it is not requisite to insert the personal name; for

that would be merely making it the case of a special constable. In point of practice, it is not usual to direct a warrant to a constable by his proper name, in order to authorize his executing it out of his district. *Vide Wallate v. King, 1 H. Bl. 13. Blatch v. Kymb, note, ibid.*

Contempt. Vide Title Attachment.

Toler's Case.

[Fsch. 12 Will. 3. B. R. 1 Ld. Raym. 555. S. C.]

Ante 104. S. C. Holt 153.

A. An infant sued a writ of appeal against *B.* as heir to *C.*, for the murder of *C.*, and *D.* was admitted as prochain amy to *A.* after the writ was sued out, and before

The writ and suit of an infant is subject only to the direction

of the prochein
amy, and not of
the infant.

it was returnable. At the day of the return the Court was moved, that the sheriff might return his writ. The under-sheriff in his excuse shewed the Court, that the infant who was plaintiff, with some others his relations, came to him, and required him to deliver back the writ to them, and that he did deliver it accordingly: And it was insisted that it was common for them to deliver writs back to the party when he desired it; and though the plaintiff was an infant, yet an infant might recalc the writ, for an infant may disavow his guardian. 2 *Bulst.* 59. And he may disavow his suit. 1 *Ro.* 288. *Holt C. J. contra.* The suit is subject only to the direction of the guardian, and so is the writ. The infant can no more dispose of the writ than he can prosecute it, and he has no more power over it out of court than in court. It is true, upon the return of the writ the infant may be nonsuit; and if he appear, he may be nonsuit after appearance, but then the appellee shall be arraigned at the suit of the king. So if an infant comes in and disavows the suit, the Court may discharge the guardian; and yet that is strange, for to enter a *retraxit* is error: but supposing the Court might have done it, what is this to the under-sheriff? How comes he to take upon him to judge of it? He has delivered the writ without authority, and this is a contempt. *Et per omnes justic. prater Turton,* The under-sheriff was fined and committed, notwithstanding his clerk in court offered to undertake for the fine. After this the Court of Chancery was moved for a new writ of appeal, but it was denied, (*ut audiui,*) for the year and day were elapsed, upon a solemn hearing before Sir *Nathan Wright*, the Master of the Rolls, *Treby*, C. J., and *Powell*, J., and *Ward*, C. Baron.

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Sheriff fined and committed for delivering infant's writ of appeal to him.

Continuance and Discontinuance.

1. *Bisse versus Harcourt.*

[*Pal. 2 W. & M. B. R. Intr. Hill. ult. Rot. 217.*]

Wrong prayer of judgment in replication makes discontinuance.

INDEBITATUS assumpsit. The defendant pleaded an attainder of high treason in disability. The plaintiff replied a pardon *prout per exemplification. inde, &c.* (which

(which was held good,) *et pet. judicium & dampna sua*. To which it was demurred, and held, that there was a discontinuance by the misconclusion of the replication; for an ill prayer of judgment is as none. This case is cited in *Bonner v. Hall*, 1 *Ld. Raym.* 338.

3 *Med.* 281.
S. C. 1 *Show.*
155. *Carth.*
126, 137. *Vide*
pa. 211. *Raft.*
Entr. 663. b.
681. *Co. Ent.* 160.

2. *Walwin versus Smith.*

[*Trin.* 3 *W. & M. B. R.* *Rot.* 361.]

DE B T was brought upon a bond, in the court of the corporation of *Hereford*, conditioned to perform articles. The defendant pleaded performance. The plaintiff replied, and assigned a breach, whereupon issue was joined. And then there was an entry, that the mayor was removed and another chosen, but no day was given to the parties, nor any court held; but after this a *venire* was awarded, and the issue tried. Upon a writ of error brought in *B. R.* it was objected, that the stat. 32 *H. 8. c. 30.* did not extend to inferior courts, and that it helped only discontinuances of pleas or process, and not of the court. But *per Holt, C. J.* It is a remedial law, and shall be construed to extend to all discontinuances, and that as well in inferior as superior courts; and indeed inferior courts have most need of such assistance. *Gregory's case*, which is of a penalty given by statute to be recovered in any court of record, which must be taken strictly for those at *Westminster*, differs; for that is a penal law, and the courts at *Westminster* are those which the king's attorney general attends.

Carth. 206.
S. C. *Holt* 155.
4 *Mod.* 86.
Stat. 32 *H. 8.*
c. 30. extends
to all discontinuances, as well
of court as process, in inferior
as in superior courts. *Carter*
51. contra.
2 *Saund.* 258.

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3. *Moor versus Green.*

[*Mich.* 6 *W. & M. B. R.*]

IN debt upon a judgment brought in *Trin.* term, the defendant imparled till *Mich.* term, and then pleaded in bar, that the plaintiff *die Luna prox. post fest. Sti. Martini* was outlawed; to which the plaintiff demurred. It was urged; that the outlawry was mesne between the action brought and the plea pleaded, and that all matters in discharge of the action, which happen after the action brought, ought to be pleaded *puis darrein continuance*. *Vide Yelv.* 140. But the Court compared this to the common case of a judgment confessed by an executor after an action brought, which is never pleaded *puis darrein continuance*, but as this case is. And in these cases the time of the outlawry, and the time of the judgment, and when it was, appear in themselves.

5 *Mod.* 11. *S. C.*
Outlawry of
plaintiff between
action brought
and plea pleaded
need not be
pleaded *puis*
darrein conti-
nuance. *Lut.* 6,
1178. *Com.*
Dig. Abatement,
l. 24. 1 vol. 3d
edit. pa. 97.

4. Price *versus* Parker.

[Pas. 8 Will. 3. B. R.]

1 Lev. 48. Discontinuance by leave of the Court may be after special verdict, not after general. 1 Lev. 227, 298.
2 Lev. 118, 124.
1 Sid. 60, 84, 306. 1 Mod. 13.
41. 2 Danv. 156. 1 Saund. 23, 339. 2 Saund. 73. Fy. 5.

UPON a motion to discontinue upon payment of costs, the Court held, that after a general verdict there can be no leave given to discontinue; for that would be having as many new trials as the plaintiff pleases: but that after a special verdict there may, because that is not complete and final; but in that case it is great favour. The same point was so ruled *inter Reeve and Gelding*, Pas. 5 & 6 W. & M. B. R. (a)

(a) Leave to discontinue after special verdict will not be given in a hard action, *Boucher v. Lawson*, Ca. B. R. 1744. Not to let in proofs in contradiction of the former verdict, *Roe ex dem. Gray v. Gray*, 2 Bl. Rep. 815. *Vide Carib. 86. Com. Dig. Plead. W. 5. 5 vol. 3d edit. pa. 546.*

5. Barber *versus* Palmer.

[Trim. 13 Will. 3. B. R. 1 Ld. Raym. 693. S. C.]

Plea *paua darrein continuance* is a waiver of the bar. Cases B. R. 539. S. C.

IF after a plea in bar the defendant pleads a plea *paua darrein continuance*, this is a waiver of his bar, and no advantage shall be taken of any thing in the bar (b).

(b) *Cro. Bl. 49. Yelv. 181. Freem. 252. Bull. N. P. 309.*

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6. Weeks *versus* Peach,

[Mich. 13 Will. 3. B. R. 1 Ld. Raym. 679. S. C.]

Ante 94. If a plea to the whole answers but part, it is demurrable; if a plea to part answers but part, the plaintiff must take judgment for the rest. Infra, pl. 9. 3 Lev. 40, 55. PoB. pl. 9. 1 Saund. 268. 2 Saund. 73. See Far. 154. 3 Lut. 1212. S. C. N. L. 384. Holt 561. *Vide Woodward v. Robinson*, 1 Str.

REPLEVIN for taking chattels in *quodam loco vocat. A., ac etiam in quodam al. loco vocat. B.* The defendant avowed the taking in *predict. loco in quo, &c.*, for that such a one was seized of the *locus in quo, &c.* To this the plaintiff demurred. *Et per Cur.* The *locus in quo* relates only to one place, so that there is a discontinuance, the avowry not being an answer to the whole declaration; and this difference was taken *per Holt*, C. J. If a plea begin with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is naught, and the plaintiff may demur; but if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance (c), and the plaintiff must not demur,

(c) *R. acc. Ld. Raym. 231. Str. 304.*

but

But take his judgment for that as by *nil dicit*; for if he demurs or pleads over, the whole action is discontinued (a).

302. Vincent v. Befton, 1 Ld. Raym. 716. Peers v. Henriques, 2 Ld.

Raym. 841. 7 Mod. 124. Gilb. C. B. 62, 155.

(a) By the report in Lord Raymond, it appears that the defendant moved for leave to amend by inserting *loci* for *locus*, which was denied, being after demurrer; but such amendments are now allowed on payment of costs.

7. Curluis *versus* Padley.

[Pas. 2 Ann. B. R. 2 Ld. Raym. 872. S. C. called Curlewis and Dudley.]

IN *debt*, the declaration was of *Michaelmas* term, and the plea-roll of *Easter*, and no continuance entered; and this upon demurrer was shewed to the Court as a discontinuance; but they said, The practice is never to enter continuances till the plea-roll be entered up, though the declaration be of four or five terms standing.

Continuances are not entered in B. R. till the plea-roll is made up.

8. Turner *versus* Turner.

[Pas. 2 Ann. B. R. 2 Ld. Raym. 856. S. C.]

IN *debt* upon a bond the defendant pleaded a composition; and this being argued several times at bar upon demurrer, at last the Court gave a rule for judgment, *nisi causa*. And being stirred again, the former rule was made absolute. The next day Mr. Mountague moved to discontinue, alleging, that this was a sham plea, and no such composition ever made, and cited 1 *Saund.* 39. 23. 2 *Saund.* 73. But *per Holt*, C. J. After a rule *nisi*, and then a peremptory rule for judgment, it was never done. The rule of the old books was, if after an exception was stirred, and the Court had given their opinions, the plaintiff would be so hardy as to demur, he must do it at his peril, and so it is here (b).

Plaintiff cannot discontinue after rule for judgment for the defendant. 1 Ld. Raym. 292, 48, 298. Vide *prox. Pag.* ante. *Holt* 156. S. C. Lilly Ent. 23.

(b) Plaintiff cannot move to discontinue after judgment, as in case of a nonsuit; *Barnes* 316.

9. Market *versus* Johnson.

[Hill. 3 Ann. B. R. 2 Ld. Raym. 1121. S. C. 11 Mod. 36, S. C.]

Ante, pl. 6. Far.
24. Carter 51.
Plea to part, if
plaintiff do not
take judgment
for the rest,
makes a discon-
tinuance.

Several bars may
be pleaded to
several parcels of
a debt on bond.
3 Lev. 40, 55.
Ante 94, 179.
Far. 124.
1 Lev. 48.
3 Lev. 118.

DEBT upon a bond of 400 *l.*; the defendant as to 225 *l. parcell. de predict.* 500 *l.* pleads payment; the plaintiff demurred. *Et per Cur.* This is only a plea to part; for in debt upon a bond a man may have several pleas in bar; as suppose the plaintiff sues as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff: So a man as to part may plead payment, and as to the rest an acquittance; then there being no answer as to the residue, here is a discontinuance for the residue; and the plaintiff should have taken judgment by *nil dicit* (a). *Et nota*, This was in *Hilary* term, and the plea was delivered in *Michaelmas*, but made up as of *Hilary*, which being observed, the plaintiff took judgment still, and the Court held he might do it; and it was said, that though the plea was delivered in *Michaelmas*, yet it being only a plea to enter, it might be entered as of *Hilary*, and so trick for trick (b).

Vide Co. Ep. 142. In debt upon a bond there is issue joined as to part, and demurrer joined as to the rest, both are continued for a long time by *Cur. advisare vult*, &c. at last a discontinuance is recorded, viz. *recordatur per Cur.* such a day of *May*, term. *Pas. anno*, &c. *quod illud placitum non habet diem ultra octavas sci. Hilarii.*

(a) *Vide* references to pl. 6. 155, 160. *Vide* Ld. Raym. 231. Str,

(b) *R. acc.* on both points, Ld. 303.

Raym. 716. *acc. Gilb. C. B.* 62,

10. Regina *versus* Tutchin. *Vide* this case, Title Amendment, pl. 14.

Convictions.

1. Domina Regina *versus* Dyer.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 1406. cited.]

DYER was convicted on the stat. 7 Jac. 1. c. 7. for buying embezzled yarn, and it set forth, *Whereas complaint had been made unto A. and B., &c. And whereas the defendant was summoned to appear before them, and by virtue thereof did appear on Tuesday the 17th day of April 1702, &c.*, it was objected, that there was no such day as Tuesday the 17th day of April 1702.; and indeed the 17th day was Friday, so that the time of the summons being impossible, it was the same thing as if there had been no summons, and a summons was necessary. *Vide 2 Bulf. 48. 9 H. 6. 44. Pl. 31. Dy. 95. Ray. 192. 2 Jo. 50, 12 H. 7. 12. Et per Cur.* Upon the complaint the justices ought to make a memorandum and issue a summons, and if the party will not appear, or cannot be found, he may proceed. In the principal case it is manifest there could be no such day, and therefore he could not appear thereupon; and when one day is set forth, his appearance on another cannot be intended: Therefore the conviction was quashed (a).

Holt 157. S. C. 6 Mod. 41, 96. Summons necessary in summary convictions, unless the defendant appears without. Post 383, Mod. Cases, &c. 378.

Where the time is impossible, it is as no summons.

(a) But if the defendant actually summons. *K. and Johnson, Strange* appears, it cures every defect in the 261. *Boscawen* on Convictions, 58.

2. Domina Regina *versus* Barnaby.

[Trin. 2 Ann. B. R. 3 Ld. Raym. Entries 35. 2 Ld. Raym. 900. S. C. Comyns 131.]

ON a *certiorari* was returned a conviction upon the 43 El. c. 7., setting forth, *Whereas complaint has been made unto us, &c. by Sir R. B. that the defendant in the night-time cut down divers lime-trees of the said Sir R. B. &c.* the justices awarded that he should pay so much for damages. The defendant was styled gentleman in the order, and it was objected, 1st, That a gentleman was not within the statute which speaks of vagabonds and such base people,

In convictions on 43 El. c. 7. the number and nature of the trees must be set forth. 3 Salk. 217. S. C. *Vide Bla. Rep. 1209, 1210. Sir. 900.*

people, and inflicts a base punishment, viz. whipping, which the law did never intend for a gentleman. 2dly, That the conviction is uncertain, for want of shewing the number of trees.

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5 Co. 72. 2.

By three judges
against Holt,
C. J. refused to
receive a plea to
such conviction,
and St. John's
case denied.

If a judgment of
justices is con-
firmed by B. R.
no action lies
against them or
the officer.

Curia. To the first, Whether the defendant be a gentleman or not, is not material; for if a man of quality will do a base or mean thing, there is no reason or justice why he should be exempted from the punishment: the quality of the offender is rather an aggravation than a lessening of the offence. To the second, the number as well as the nature of the trees should be expressed, for this is like an action of trespass in this respect, that the plaintiff is to recover damages, of which the number and nature of the trees is to be the measure; and if an action of trespass shall hereafter be brought for these trees, this conviction ought to be a plea in bar. 3dly, The defendant in this case pretended he had a title, and offered to plead it to the conviction, as was done in 3 Cro. 821. and in 5 Co. St. John's case. *Powell*, Justice, held, that could not be done, for if the defendant had title, and the property was in question (a), then the justices had no jurisdiction, and then he is not without remedy; for he may have his action on the case against the justice, or him that executes the sentence. On the other side, if the justices had a jurisdiction, we have no power to question their judgment, and this is a new thing without precedent. *Powys* and *Gould* agreed. *Holt*, C. J. *contra*, (who indeed started this point,) that *St. John's* case was a precedent for this way of pleading to a conviction, and that it was and must have been done so there, or else the point of the dagger could not have come in question. He said it was as reasonable to falsify the proceedings before the justices in this manner, as by an action against them; and as to what *Powell* said of a remedy by action, he answered, that if this order were confirmed, no action would lie against the justices, or him that executes the sentence, for then it is supported by the authority of this Court; and he said it was hard that this Court should by their judgment give an authority to that which ought not to have been done. *Note*, It was said the record of *St. John's* case was not to be found. The conviction was quashed upon the second point. *Sed quere*, if he proceeds without ground, and makes a good order. For B. R. is not judge of the fact, but the law upon the fact.

(a) The defendant in this case pretended he had title (1).

(1) *Rex v. Speed*, 1 Ld. Raym. 583. Per colour of right by mistake. Vide *Kimmerley v. Orpe*, Doug. 517.
Holt, no person ought to be convicted under a statute against killing deer who acts under a

3. Domina Regina *versus* King & al.

[Hill. 10 Ann. B. R.]

A Conviction for deer-stealing was removed against *A.* and *B.*, wherein judgment was given that each should forfeit 30 *l.*, and it was objected that there ought to be but one 30 *l.* forfeited: *Sed non allocatur*, for the words of the act are, that they shall *respectively* forfeit 30 *l.* *Cro. El.* 480. *Mo.* 453. *Noy* 60. And this penalty is not in nature of a satisfaction to the party grieved, but a punishment on the offender; and crimes are several, though debts be joint (*a*), which *per Powell* distinguishes this from the case of *Partridge* and *Naylor* in *Cro. El.* 480, and *Noy* 62.

Respectively forfeit in statute, makes the forfeiture several upon each offender *Trem.* 366. S. C.

(*a*) The principle to be attended to in cases of this nature is stated as follows, by Lord Mansfield, in *Rex v. Clarke*, *Qwup*, 610, 612. "Where the offence is in its nature *single*, and cannot be severed, there the penalty shall be also *single*; because, though several persons may join in committing it, it still constitutes but *one* offence.

But where the offence is in its nature *several*, and where *every* person concerned may be *separately* guilty of it, there each offender is separately liable to the penalty, because the crime of each is distinct from the offence of the others, and each is punishable for his own crime." *Vide Rex v. Bleasdale and another*, 4 *T. R.* 809.

Vide plus, Title Indictment, &c. 369.

Conusance of Pleas. *Vide Title* [183]
Courts Inferior.

1. Cotten *versus* Johnson.

[Hill. 2 W. & M. C. R.]

IN trespass and ejectment for lands in *A.* In the 11th of *Ely*, after *non cul.* pleaded, a suggestion was entered, *quod nullus justiciarius vel minister domini regis insulam illam ingredi* Suggestion made upon the roll without the nient dedire,

or confeſſion of the other party, is well. 4 Inſt. 220. Carth. 109. S. C. 3 Salk. 110.

ingredi poteſt ad aliquam jurat. extra, &c. and ſo prays a *verdict* to R. the next village in the county of Cambridge. *Et quia videtur juſticiariis rationi conſonum conceditur, &c.* And it was objected, that the *nient dedire, i. e. quia def. hoc non dedit*, or elſe the confeſſion of the defendant, ſhould have been entered, and that ſo are the precedents. *Curia*: Either way is good. If it be not true, you may bring error; if it be true, then it is right.

2. Foſter verſus Mitton.

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 427. S. C. named Foſter v. Hexam.]

Demand of conuſance, and the method of entry thereof. Show. 352. 2 Willſon 406.

1 Mod. 163.

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An immemorial uſage ought to be ſhewn, and then an allowance in B. R. or in eyre. 2 Inſt. 283.

SERJEANT Wright came into court and demanded conuſance of pleas for the biſhop of Ely, in an action of treſpaſs *quare clauſum fregit*, which was pending in this court, being removed hither by *certiorari*: And firſt of all, the warrant of attorney under the biſhop's ſeal, in Latin, was read, and then the record of the plea, as it ſtood; and the record went on, *Et modo ad hunc diem, venit epiſcop. Elienſis per J. S. attorn. ſuum. Et pet. cognitionem. &c. quia dicit*, that the place where, &c. is within the liberty of the biſhop of Ely, and that *alias ſcilicet Mich. 20 E. 3 B. R. Rot. 34.* in treſpaſs, aſſault, and battery, and Hill. 21 E. 3. Rot. 21. B. R. in treſpaſs *quare, &c.* and Hill. 17 & 18 Car. 2. Rot. 229. B. R. in treſpaſs and ejection, and in 35 Car. 2. Rot. 151. treſpaſs, aſſault, and battery, this privilege was allowed, and ſo prays his privilege *habendi cognitionem*, and then the entry went on, *et queſtum eſt* of the defendant *ſi quid dicere queat quare, &c. ſuper quo allocatur, &c.* and then day is given upon the roll to the parties at Ely, &c. *Et dictum eſt epiſcopo quod in ceteris juſtitia fiat.* The two laſt records were produced in court; but becauſe the old records were not produced, and it was the laſt day of the term, it was adjourned. Holt, Chief Juſtice, doubted as to this ſort of pleading, for he ſaid, the true way of pleading was to allege an immemorial uſage, and then alſo produce the allowance in B. R., or in eyre; for ſuch privilege lies not in preſcription, but in grant: And becauſe, if the charter were before time of memory, viz. before 1 R. 1. the ſaid charter could not be pleaded; therefore, by the ſtat. *de quo warranto* 6 E. 1., you may lay an uſage time out of mind, which is an argument of an ancient grant, and ſhew the allowance. But without ſuch uſage the preſumption of law fails; vide Keilw. 189, 190. 1 Sid. 103. and in that caſe you ought to ſhew your patent.

This

This was moved again in *Trinity* term, and *Holt*, C. J. asked for the record of *E. 3.*, and they had only a copy thereof; whereupon he said, that the record should have been produced, for the entry is *inspect. record. &c.* Also he said, there was no need to plead several allowances; it was enough to plead one, and rely on it.

The record of the allowance must be produced. *Skin- 51, 239.*

3. *Crofs versus Smith.* *Vide* this Case, *Title Certiorari.*

Copyhold and Copyholder.

1. *Dudfeild versus Andrews.*

[*Trin. 1 W. & M. C. B. Rot. 760.*]

STEWARD of a copyhold manor may without custom take surrenders out of court, for he hath the power of the lord, and the lord may do it: But why not out of the manor, since it is granted he may out of court; and it may be convenient, but can be prejudicial to no body. *Vide 2 Cro. 526. 1 Leo. 227. con. 1 Inst. 59. 1 Ro. 500.* There are two sorts of customs, viz. general throughout all manors, which the Court takes notice of; particular, which must be pleaded. *Et per tot. Cur.* There is as much reason, that the steward should take surrenders out of the manor as the lord, and that he should do it out of the manor as out of the court (*a*).

Steward of a copyhold manor may take surrenders out of the manor. 4 Co. 26. b. 3 Bull. 239. 1 Leon. 289. 1 Roll. Abr. 527. pl. 3. Cro. Jac. 403. Bridg. 52. 2 Dan. 181. pl. 3.

(*a*) *D. acc. Harg. Co. Lit. 59. n. 6.* tom that the steward shall not take In *Tukeley v. Hawkins*, 1 *Ld. Raym.* surrenders out of the manor, is void. 76. it was said *per Curiam* that a cus-

2. *Glover versus Cope.*

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[*Mich. 3 W. & M. B. R. Intr. Pas. ult. Rot. 267.*]

PER *Curiam*, The surrenderee of a copyhold reversion may bring debt or covenant against the lessee within the equity of the 32 *H. 8. cap. 3.*, for it is a remedial law, and

Carth. 205. Show. 284. 4 Mod. So. Surrenderee of

copyhold is with-
in the equity of
the Stat. 32 H. 8.
Co. 3. 3 Lev.
326. 3 Cro. 24.
Hob. 176.
3 Lev. 326.
Skin. 296, 305.
Comb. 185.
Holt 159.
2 D an. 241. pl. 1.

and no prejudice can arise to the lord; and whether he is in the *per* or in the *pos.* is not material; for a bargainee may maintain covenant within this statute; and yet no doubt but he is in the *pos.* and *Ye. v.* 222. was a hasty resolution; and *Hob.* 178. only an extrajudicial opinion. Judgment for the plaintiff. *Note.* The words of the act are, *no person being a grantee or assignee of any reversion.*

3. Benson *versus* Scot.

[Pas. 5 & 6 W. & M. B. R.]

Carth. 275.
4 Mod. 251.
3 Lev. 385.
Admittance re-
lates to surren-
der, and surren-
dere's title be-
gins from
thence. 1 Inst.
59. b. 3 Bulst.
219. 3 Cro.
100. Cro. Car.
410. Comb.
233. Skin. 406.

EJECTMENT a special verdict was found, *viz.* a custom, that the tenants of the manor having a mind to alien, might surrender into the hands of two copyholders, &c. that Scot, being a copyholder in fee, did surrender, &c. to the use of the plaintiff in fee, and died, leaving his wife, who claimed her free-bank by the custom, and at the next court the surrender was presented, and thereupon the plaintiff admitted; and the question being, Whether the surrenderee, or the wife for her frank-bank, should have these lands? It was adjudged for the plaintiff; for the wife's title does not commence till after the death of the husband, and then only to those lands of which he died seised; but the plaintiff's title began by the surrender; for the admittance relates to that (*a*); and that the case of two joint-tenants, 1 Inst. 59. b. rules this case.

(*a*) *R. acc.* 4 Bur. 1981. *R.* also tance, is entitled to free bench. *Yak*
5 Bur. 2785. That the widow of a 3 *Wyl.* 16. 1 *T. R.* 600.
surrenderee who died before admit-

4. Brittle *versus* Dade.

[7 Will. 3. C. B. 1 Ld. Raym. 43. S. C. named Brittle v. Bade.]

Ancient de-
mesne.

Bur. 1046.

EJECTMENT. The defendant pleaded, that the land was held of the manor of *D.* which is ancient demesne. The plaintiff replies, *quod bene & verum est*, that the lands aforesaid are held *de decano & capitulo de Wigornia ut de manerio*, &c. which is ancient demesne, but that the lands are copyhold-lands: The defendant rejoins, *ex quo pradi.* the plaintiff *cognovit* the lands to be ancient demesne; it is no matter whether they are copyhold or frank-fee. Plaintiff demurs. *Et per Cur.*

ist, The

1st, The replication is repugnant, for lands held *ut de manerio* must be frank-fee; for copyhold lands are parcel of the manor, and cannot be held *ut de manerio*; and therefore the replication, by saying they are held *ut de manerio*, and yet they are copyhold, is repugnant.

Copyhold lands are parcel, freehold lands are held *ut de manerio*.

2dly, The rejoinder is naught; for if they be copyhold, an ejectment lies: 1st, Because copyholds are of so base a nature, that a writ of right will not lie. *N. B.* 12. a. 2dly, It would be inconvenient, because copyholds are parcel of the demesnes of the manor, so that if they are triable in the lord's court, the lord might be judge and party; and therefore *per Treby*, C. J. The jurisdiction of the lord's court extends to land holden of the manor only, and not to land parcel of the manor. Judgment *quod breve cessatur*. 3 *Lev.* 405.

Writ of right lies not of copyhold. Ante 56.

5. Eastcourt *versus* Weeks.

[*Trin.* 10 Will. 3. C. B. Rot. 355.]

EJECTMENT on the demise of *Anne Eastcourt*; a special verdict was found, that the lands in question are copyhold, parcel of the manor of *Newton*, and that *William Weeks* was copyhold tenant in possession for life, and Sir *William Eastcourt* lord; that Sir *William* died, and the manor, &c. descended to his two sisters, *Mary* and *Anne*: That *Weeks* suffered his house to be ruinous, and made a lease of his copyhold for ten years; and that *Mary* died, *per quod* all descended to *Anne* her sister and heir; that *Weeks* died, and his wife entered claiming her widow's estate, and that *Anne* entered for the permissive waste of the husband, and his lease for ten years without licence. *Et per Cur.* It was admitted in this case, that these were both causes of forfeiture; but the question was, Whether the plaintiff could take advantage of this forfeiture. *Et per Powell*, At common law the heir was entitled to take advantage of any causes of forfeiture in the time of his ancestor, but waste and *cessavit*; waste he could not, because it is a personal wrong, which dies with the person; *cessavit* he could not, because the tenant by the statute has liberty to save himself by tender of arrears, which are not due to the heir, but to the executors. In all other cases the estate determines by the act of forfeiture; and though the tenant hold in possession, it is a disseisin to the lord, if he will. 1 *Ro.* 508. 1 *Inst.* 59. *Godb.* 47. 1 *Inst.* 233. *Fitz. Trespass* 254. 1 *Jones* 136. *Palm.* 438, 439. And this election of making it a disseisin being annexed to the inheritance descends to the heir. *Noy* 57. 1 *Leon.* 242. 1 *Inst.* 63. 1 *Ro.* 508. And where there are two coparceners,

Cause of forfeiture of copyhold does not descend to the heir. *Palm.* 416. 1 *Mod.* 200. 1 *Bull.* 190. *Lut.* 226. 2 *Sid.* 8, 9. 1 *Lutw.* 799. *S. C. N. L.* 246. 1 *Freem.* 516. *Har. Co. Lit.* 63. 2. n. 1. *Doe v. He'llier*, 4 *T. R.* 164.

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Tenant for years makes feoffment; it is a forfeiture; otherwise of a lease for longer term.

ceners, and one will take advantage of a forfeiture, and the other not, there must be an apportionment. 1 *Inst.* 355. *Keilwey* 105.

Treby C. J., *Nevil*, and *Blencow* held, that the continuing in of the tenant after forfeiture was no disseisin at election of the lord. It was admitted, that if tenant for years or life make a feoffment or levy a fine, it is a forfeiture, and also a determination of their estate and a disseisin; but if tenant for years make a lease for a longer term than he has, they held it no disseisin nor forfeiture, because it is only a contract between him and his lessee, which does not operate on the interest of the lessor to affect it with any prejudice.

Cro. El. 498.
Moor 392. pl.
508. 3 *Co.* 65.
a. *Dyer* 239.
pl. 41.

They held, that a lease by a copyholder was a forfeiture, because it was a breach of trust, *Mo.* 272, 392, 184. and that it was a personal wrong as much as waste, which cannot be transferred by descent, but must be taken advantage of by him that was wronged.

Also they held, that the estate of the copyholder was not determined, because the lord by acceptance of rent, &c. might affirm it.

Co. Lit. 53. b.

Lastly, They held the election must be made by both the parceners; that the thing is entire, and that therefore the surviving sister could not elect after the death of her sister; and as to the case of *Co. Lit.*, where the aunt and niece are said to join in waste, they much doubted of it, for the books cited do not warrant that opinion, and other authorities are contrary. *Mo.* 34, 110, 40, 127.

6. Kettle *versus* Townsend.

[Temp. Will. 3. In Canc.]

Equity ought only to supply a surrender against the heir, in favour of a son or a daughter; but prior provision is not material.

ONE devises a copyhold-estate to his grandson; and *Sommers*, Lord Chancellor, decreed the will good, and that equity ought to supply a surrender as well as in case of a son; that a grandson was a son, and the grandfather was bound to provide for him. But the House of Lords reversed this decree, and held, Equity ought not to supply such a defect in disfavour of the heir at law, unless it were in favour of a son or a daughter; and not then neither, if it was to disinherit the eldest son; but it was not material that such a son was provided for before, nor how far, for the father only is best judge whether he has fully advanced his child, or not (a).

(a) The following is an extract from Mr. *Coxe's* note to the case of *Watts v. Bullas*, 1 P. Wms. 60. "It seems

now to be established, that a defect in the surrender of a copyhold, or the execution of a power (which are governed

verned by the same rules, *Chapman v. Gibson, ubi infra*) shall be supplied only in favour of three descriptions of persons, viz. creditors, wife, and children; *Goodwyn v. Goodwyn*, 1 *Vez.* 228. *Byas v. Byas*, 2 *Vez.* 164. *Tudor v. Anson*, 2 *Vez.* 582.; and so, though the wife hath only a limited interest (as an estate for life) in the subject, with remainder over to strangers, *Marsson v. Gowan*, 3 *Bro. Ch.* 170. But it shall not be supplied in favour of a wife or younger child, if the heir at law, being a child of the testator, &c. be thereby left unprovided for, *Kettle v. Townsend*, *Hicken v. Hicken*, 6 *Vin. Ab.* 59. pl. 12. *Hawkins v. Leigh*, 1 *Atk.* 387. It is not material whether the heir in that case be wholly disinherited by his father, so that he hath some provision. *Hawkins v. Leigh*, 1 *Atk.* 387. *Chapman v. Gibson, ubi infra*. *Pyke v. Whyte*, in *Linc. Inn. Hall*, 20 July 1791. 3 *Bro. Ch.* 286. Nor is it material (although

formerly doubted, as in *Ross v. Ross*, 1 *Eq. Ca. Ab.* 124.) whether the younger children are otherwise provided for or not, *Kettle v. Townsend*, *Carter v. Carter*, *Mesf.* 370. *Burton v. Floyd*, 6 *Vin.* 56. pl. 20. *Wicks v. Gore*, 6 *Vin.* 57. pl. 24. *Cock v. Arnhem*, 3 *P. Wms.* 283. and *Ca. temp. Talb.* 35. *S. C. Tudor v. Anson*, 2 *Vez.* 582. *Pyke v. White, ubi sup.* So with respect to the wife, *Bijcor v. Cartwright*, *Gilb. Rep.* 121. *Smith v. Baker*, 1 *Atk.* 386. The same rules obtain between co-heirs at law, and between heirs in gavelkind, as between the eldest son and younger children, *Baker v. Jennings*, 6 *Vin.* 54. pl. 10. *Andrews v. Waller*, 6 *Vin.* 237. pl. 12. But if the heir at law be not a child of the testator, &c. although wholly unprovided for, the defect shall be supplied in favour of the wife. *Chapman v. Gibson*, at the *Rolls*, Feb. 1791, 3 *Bro. Cha. Rep.* 170.

7. Smartle versus Penhallow.

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[Intr. Hill. 13 W. 3. B. R. Rot. 380. 2 Ld. Raym. 994. S. C.]

IN *ejectment* a special verdict was found, viz. That the lands in question were parcel of the manor of *Tregoon*, of which the bishop of *Exeter*, lessor of the plaintiff, was seised; and that by custom of the manor the said lands are demisable by copy of court-roll to two or three persons for their lives, and the life of the survivor, *habendum successive sicut nominantur in charta, & non aliter*, and that the lord is to have a heriot on the death of every tenant dying seised. They farther find one *Nesworthy* was tenant for life of the manor by grant from the predecessor of this bishop; and that he by copy granted the tenement in question to *A.* and his assigns, for the lives of *B.* and *C.* and of the said *A.*, and that *Nesworthy* is dead. The question was, Whether this grant be warranted by the custom? And it was urged for the plaintiff, that *A.* has the whole estate, and that *B.* and *C.* are not named to take an interest but by way of limitation; and that if *A.* die, here is room for an occupant, which is to put a tenant upon the lord without his consent: Also if *A.* should become bankrupt, this estate would be assignable; and upon this lease

6 Mod. 63.
Custom in a manor to grant lands by copy to two or three persons for their lives, habendum successive, &c.
Grant to A. habendum to him during the lives of A. B. and C., is warranted by the custom.
1 Mo. 102.
6 Co. 37. Cro. El. 58, 721.
2 Bull. 11, &c.
Vaugh. 187.
3 Salk. 131.
S. C. Holt 163.

the lord can have but one heriot; whereas in the custom any leases the lord is to have three. They admitted that where a power or custom warrants a greater estate, it will warrant a lesser, as, if the lord may grant for three lives, he may for one; but then it must be of the same nature. If *H.* has a power to lease for three lives, he cannot lease for 500 years, though it be a lesser estate in law. If a bishop make a lease for 30 years, it is wholly void as to the successor, because his power is exceeded: So in this case.

On the other side it was argued *pro def.*, that this was no greater estate than what the custom allowed: That if this grant had been made to *A. B.* and *C. habendum successive* for their lives, they might have surrendered to three others, and the lord was compellable to admit them, and they would have an estate *pur auter vie*, that if the tenant may by his own act make such an estate, it is most unequal to say that the lord cannot. As to the lord it is the same thing, whether *A.* takes for his own life, and the life of *B.* and *C.*, or *A. B.* and *C.* take for their lives: And there cannot be an occupant of copyhold lands, neither are they within the statute of frauds to be assets or devisable, 2 *Ch. Caf.* 201.; and as to the heriot, it will be due on the death of every assignee that is admitted.

If copyhold tenant *pur auter vie* die, the lord shall enter; and no occupancy is. Mod. Cases 68.

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Rent to *A. pur auter vie*, ceases by *A.*'s death.

Occupancy is only to supply a freehold.

Holt C. J. 1st (*a*), There can be no occupant of a copyhold estate for the prejudice it would do the lord: But if the copyholder being tenant *pur auter vie* die, the lord shall enter. As * if there be tenant for life of a copyhold, remainder to another for life, and tenant for life commits a forfeiture, the lord shall enter. If *H.* grants a rent out of his lands to *A. pur auter vie*, and *A.* dies, shall not the rent cease? What is the reason? Because here wants a grantee. So it is here; an occupancy is for supplying a freehold: In copyholds the freehold is in the lord; the tenant has only an estate at will.

2dly, He held that the custom consisted in three parts: 1st, The constitution of the estate, *viz.* by copy. 2dly, The extent for three lives. 3dly, The manner of the estate, which by operation of the custom differs from the constitution at common law, *viz.* to three, *habendum successive*.

What is done here is not so much as the custom: The custom enables him to grant for three lives, and he grants but for one. If the custom be to grant in fee, &c. *non aliter*, yet the lord may grant for life, or to *A.* for life, remainder to *B.* in tail. If the custom be to grant for life, the lord may grant *durante viduitate*. Vide 1 *Cro.* 323, 373. This is not like the case of a bishop's lease: That cannot

Bishop's lease exceeding the statute, is void as to the successor in toto.

(a) Vide 2 *Bl. Rep.* 1148,

be

be good for any part, because the statute ties it up to an express form. *Aliter* perhaps, had it been that bishops should make leases for any number of years not exceeding such a number.

As to the supposal of the bankruptcy, *Powell* at first doubted upon that inconvenience, saying it could not be good if it prejudiced the lord; but *Holt* thought that made no difference; for if the copyholder being bankrupt, his estate was assigned, the assignee would have the estate determinable upon the death of the copyholder, and then the heriot would be due, and not by the death of the assignee; for so it was originally, and cannot be altered by any act of the copyholder. But *per tot. Cur.* This is a supposal not in the case, and therefore it was not determined. Judgment *pro def. per tot. Cur.* See 1 *Roll. Abr.* 511.

An act of the copyholder cannot alter his estate in prejudice of the lord.

Rex & Regina *versus* Bunney.

[Mich. 1 W. & M. B. R.]

IF a coroner's inquest be quashed, the coroner must take a new inquest *super visum corporis*; but if a *melius inquirendum* be granted on a *male se gessit* of the coroner, the new inquiry must be before the sheriff or commissioners, not *super visum corporis*, but upon affidavits; for none but the coroner can inquire *super visum corporis*, and he is not to be trusted again: But when an inquisition is quashed, it is as if no inquisition had been taken (a).

Upon quashing inquisition, the coroner makes a new one *super visum*; upon a *melius inquirendum*, the sheriff or commissioners by affidavits.

Carth 72. King *versus* Bonny,

3 Mod. 80, 228. S. C.

(a) *Vide* Str. 22, 167, 535. 1 *Vent.* 182. 2 *Lev.* 141, 152.

Clerk's Case. *Vide* Title Indictments, &c.

Corporation.

1. Butler *versus* Palmer.

[Trin. 11 Will. 3. B. R.]

Elections to be made by the body at large, may be restrained to a select number. 4 Co. 77. b. 78. a. 4 Inst. 48, 49. Jenk. Rep. 273. Cases B.R. 247. S. C.

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4 Co. 78. a.
3 Bulst. 71.
2 Danv. 216.

Surrender of charter void without enrolment. Post 190.

Where members under a good old charter join with members under a bad new one, the act is void.

IN an action for a false return of a *mandamus* it appeared, that king *Edward* 3. granted to the burgessees of *Dartmouth* a charter to elect a mayor *de seipfis* annually, and by constitutions made in the reign of *Q. Elizabeth* and King *James* the First, and long usage in pursuance thereof, the method was for the common council to propose two persons for the freemen to choose out one of them. That thus it continued till 1641, and then a by-law was made for repealing all former by-laws, and ordaining that for the future elections should be made by the freemen at large; and accordingly the two succeeding elections were made. In the year 1684 the old charter was surrendered; but that surrender was never inrolled, and a new charter granted, under which new charter the town made a by-law repealing the by-law made in 1681. The Court resolved, 1st, That though by the grant of *Edw.* 3. the election was to be by the freemen at large, yet this might be restrained and regulated by usage and by-laws, to the choice of one out of two only (a). 2dly, That the by-law in 1681 had well restored the ancient and primitive constitution, and repealed those by-laws that altered it. 3dly, That the surrender of the old charter was void for want of an enrolment. 4thly, As to the new charter, and by-laws made under it, the Court held, That if those that were members under the old charter happened to be the only persons that acted, they should be deemed to act by virtue of their ancient and true right; but if commixed with others that were only members under the new charter, though the old members were the majority, yet they must be taken to act by virtue of the new charter, and then what they did was void.

(a) *Vide* 3 Bur. 1327. Str. 314. 1 Bur. 131.

2. East India Company's Case.

[Pas. 13 Will. 3. B. R.]

IN an action against the *East-India Company* for 5000 *l.* it was moved, that the sheriff might return exemplary issues, because several writs of *distingas* had been already served to no purpose; and the Court said, he should return good issues, and if he did not, the plaintiff might bring an action against him; but at last he was ordered to attend.

3. Anonymous..

[Trin. 12 Will. 3. B. R. S. C. 1 *Ld. Raym.* 600., by the name of *The College of Physicians v. Salmon.*]

PER Holt, C. J. My lord Coke says, that a corporation must have a name; but that must be understood to be either expressed in the patent, or implied in the nature of the thing; as if the king should incorporate the inhabitants of *Dale* with power to choose a mayor annually; though no name be given, yet it is a good corporation by the name of mayor and commonalty. So the city of *Norwich* is incorporated to be a mayor and sheriffs by the charter of *Hen. 4.*, and are called mayor, sheriffs, and commonalty.

Corporation must have a name either expressed in the grant, or implied in the nature of the thing. *Co.* 10, 29. b. *Vi. Com. Dig.* Capacity, B. 5. 2 vol. 3 edit. p. 171.

A corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler; for it neither vests nor divests any sort of interest in or out of the corporation. So held inter Cary & Matthews in Cam. Scacc. (a)

1 *Mod.* 18. Corporation aggregate may appoint a bailiff without deed. *Plowd.* 91. b. 1 *Vent.* 47. 48. *Cro. Car.* 170. 2 *Saund.* 305. *Moor* 552.

(a) *Vide* 6 *Vin. Ab.* 287.

4. The Mayor of Thetford's Case.

[192]

[Hill. 1 Ann. B. R.]

UPON a *mandamus* to the mayor and commonalty of *Thetford*, the return was made in the name of the corporation, but without the common seal, or the hand of the mayor, set to it. Mr. *Sloane* moved, that the mayor might be obliged to sign it or seal it with the corporation seal, alleging that it was not a corporate act to charge the corporation without the common seal, nor the act of the

6 *Mod.* 25. Corporation may do an act upon record without their common seal, but not in pais. 3 *Salk.* 103. *S. C.* Rep. A. Q. 141. *Holt* 171.

10 Co. 68.
Moor 676. Pl.
920. 1 Leon.
184. 1 Rol.
Rep. 32. Skin.
368.

At common law
no officer was
bound to sign a
return. Yelv. 34.

mayor without his hand to it. After search of precedents, which were found both ways, *Holt*, Chief Justice, held, and the rest concurred, that though a corporation cannot do an act *in pais* without their common seal, yet they may do an act upon record; and that is the case of the city of *London* every year, who make an attorney by warrant of attorney in this court, without either sealing or signing; and the reason is, because they are estopped by the record to say it is not their act. So if an action be brought against a corporation here for a false return, they are estopped to say, it is not their return, for it is *responsio majoris & communitalis* upon record. Neither is the hand of the mayor necessary, for he is liable in his private capacity without it; and it is sufficient evidence against him, that the writ was delivered to him, and that there is a return made, for then it is incumbent on the mayor to shew the contrary. At common law no officer was bound to sign a return. The statute of *York* obliges a sheriff to do it, but extends not to a coroner, mayor, or other officer. And the mayor, or any other magistrate of this corporation that procured this return, is liable not only in their corporate but their private capacity.

5. Cuddon *versus* Eastwick.

[Hill. 2 Ann. B. R.]

Ante 143. A
corporation may
make a fraterni-
ty, and also by-
laws to bind
strangers for
public conveni-
ence. 1 Sid.
291. 6 Mod.
123, 124. S. C.
Holt 433.

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Difference be-
tween corpora-
tion and frater-
nity.

UPON a *habeas corpus* was returned an action of debt for the penalty of a by-law made by the common council of the city of *London*. The by-law was, That whereas the company and fellowship of porters had been, time out of mind, a company and fellowship, it was ordained, that they should still remain and continue for ever a company and fellowship, and that no master of any boat, &c. from place to place to, &c. should unload or send on shore any goods but by such persons as were free of the said company. To which it was objected, 1st, That the city of *London* could not make a corporation. 2dly, That a corporation could not make a by-law to bind strangers, unless founded on public convenience. *Et per Cur.* The city of *London* cannot make a corporation, for that can only be created by the Crown; but this is only a fraternity, not a corporation, and a corporation may make a fraternity. A *corporation* is properly an investing the people of the place with the local government thereof, and therefore their law shall bind strangers (a); but a *fraternity* is some people of a place united together, in respect

(a) *Vide H. Bl. Rep.* 370.

of

of a mystery and business, into a company, and their laws and ordinances cannot bind strangers, for they have not a local power or government.

Costs.

1. Blachly *versus* Fry.

[Mich. 8 Will. 3. B. R. Comyns 19. S. C. by the name of Lutely *v.* Fry.]

IN *trespass quare clausum fregit*, and for cutting his corn and carrying it away, the jury found the defendant guilty of all but the carrying away; and *Gould* moved for full costs on the 22 & 23 Car. 2. cap. 9. *Holt*, C. J. Where the trespass is done *clamando titulum*, or the title may come in question, there shall be full costs. In *Stroud's* case for entering his close and digging turf, full costs were allowed: But the judge of assize, *viz.* *North*, C. J. certified, that the freehold came in question. So in judge *Eyre's* case, in an action on the case for stopping his way. *Adjournat.* *Vide Ray.* 487. 2 *Keb.* 756. 2 *Ven.* 315. 2 *Keb.* 849.

5 Mod. 315.
Full costs in
trespass. 2 Vent.
180, 195, 48.
Raym. 487.
2 Jon. 232.
3 Mod. 39, 40.
2 Mod. 141,
142. 2 Lev.
234. Comb.
399. S. C.
Skin. 666.
Doug. 789.

2. Dominus Rex *versus* Edwards.

[Hill. 8 Will. 3. B. R.]

IT was said *per Cur.* that the king shall pay costs for an amendment, but shall not pay costs for not going on to trial; but where there is a prosecutor, he shall pay costs for amendments, and for not going on to trial both; but then there must be an *affidavit* of the name of him who is the prosecutor, for that does not appear upon the indictment: And if the defendant does not know the prosecutor, he ought to apply to the attorney-general, who will inform him.

Crowd pays costs
for amendment,
but not for not
going on to trial.
2 Danv. 224.
2 Lill. 342.
Comb. 419. S. C.

3. Thomas *versus* Lloyd.

[10 Will. 3. B. R. 1 Ld. Raym. 336. S. C. named *Thomoe v. Lloyd*. Comb. 482. 12 Mod. 195.]

No costs on demurrers to pleas in abatement.
Post, pl. 4.
Mod. Cases 88.
Barnes 120,
257.

ASSUMPSIT; the defendant pleaded his privilege as an officer of the exchequer, in abatement, and the plea being held good upon demurrer, there was judgment *quod billa cassetur*. *Et per Cur.* It was held upon the 8 & 9 W. 3. c. 11. that the defendant should have no costs; for the act extends only to demurrers in bar, and not in abatement, because it speaks of suits which are vexatious, which does not appear to the Court on pleas in abatement; but on demurrers in bar, where the Court sees the merits of the cause, it does; and it would be very hard if the defendant should have costs against the plaintiff in such a case, when the plaintiff could have none against the defendant, though he should have had judgment *quod respondeat ouster*.

4. Garland *versus* Extend.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 992. named *Garland v. Exton*.]

Mod. Cases 88.
S. C. *Garden versus Exon*.
Ante, pl. 3.
1 And. 187.
Hard. 142.
Cro. Car. 533.
March 30.
Barnes 120,
257.

THE defendant having pleaded in abatement, the plaintiff demurred, and judgment was given for the defendant. And Mr. *Branthwaite* moved to have costs upon the stat. 8 & 9 W. 3., but it was denied, for the judgment in this case is not given upon the merits, but *quod billa cassetur*; and the statute meant only to give costs, where the merits of the cause were determined upon the demurrer. If judgment had been for the plaintiff upon this demurrer, it had not been final, but only a *respondeas ouster*, and the plaintiff could have had no costs by the statute, which therefore ought to have the same exposition as to the defendant (a).

(a) *R. acc. H. Bl. Rep.* 530.

5. Domina Regina *versus* Danvers & al.

[6 Ann. B. R.]

Information against three, and one only acquitted, he shall

IN an information against *Danvers* and others, one defendant was acquitted, and the rest found guilty at the assizes; and though the judge did not certify a probable cause,

cause, yet it was held that the prosecutor was not liable to pay this defendant costs, because, till the 8 & 9 W. 3. the plaintiff never paid costs in any action, if but one defendant was found guilty (a); and the act of 4 & 5 W. & M. c. 18. cannot be intended to make prosecutors otherwise liable, than as plaintiffs were before in other actions.

not have costs on 4 & 5 W. & M. c. 18. 1 Lev. 63. 20 Co. 16.

(a) Vide 3 Bur. 1286.

Vide plus, Title Damages, 205.

Cottages and Inmates.

[195]

Dom. Rex *versus* Everard.

[Hill. 13 W. 3. B. R. 1 Ld. Raym. 638. S. C.]

A Presentment was made at a court-leet for erecting a cottage contrary to the 31 (b) Eliz. cap. 7. not laying four acres of land to it, according to the statute *de terris mensurandis*: It was excepted, first, That this was but an ordinance. 2 Cro. 603. But *per Cur.* it was held a statute. 2dly, That the caption is *ad cur. vis. franc. pleg. cum cur. baron.*, whereas the latter court has no authority to take such presentments, *ergo* it is illegal, because uncertain which took it. 2 Keb. 139. 10 Ed. 4. 15: a. *Et per Holt, C. J.* Where there are several commissions, of which each have authority to proceed for the same thing, but in a different manner, it ought to appear by which of these it was taken; but here only one court has jurisdiction in the matter, and it must be taken as a caption by that court that had authority to proceed in it. Also, if the words had been *et cur. baron.*, the objection had been stronger. 3dly, That the year of our Lord was in *English* figures: But the year of the king being at length, the *anno Domini* was held surplusage.

The ordinance *de terris mensurandis* is an act of parliament. Holt 173. S. C.

Cro. Car. 80, 413. Diversity where two courts have jurisdiction of the same thing, and where not.

(b) N. B. The Stat. 31 Eliz. c. 7. is repealed, 15 G. 3. c. 32.

Covenant.

1. Cole's Case.

[Hill. 3 W. & M. B. R.]

1 Shaw. 388.
H. lets a house
excepting two
rooms, and is
disturbed there-
in, covenant lies
not; otherwise
if excepting a
passage thereto,
and is disturbed
in that. 5 Co.
15. Cro. Jac.
225, 438.
Carth. 232. S.C.
Cases B. R. 24.
1 Ch. Ca. 294.
1 Lev. 47.
2 Mod. 86.
Doug. 765.

BY indenture, *H.* leases a house, excepting two rooms, and free passage to them. The lessee assigns, and the assignee disturbs the lessor in the passage thereto, and for this disturbance the lessor brought covenant. *Et per Cur.* The action lies; the diversity is this, If the disturbance had been in the chamber, it is plain then no action of covenant would have lain; because it was excepted, and so not demised: *Aliter*, where the lessee agrees to let the lessor have a thing out of the demised premises, as a way, common, or other profit *apprendre*; in such case covenant lies for the disturbance. *Vide* 3 Cro. 657. *Mo.* 553. And this covenant goes with the tenement, and binds the assignee. Judgment *pro quer.*

2. Griffith *versus* Harrison.

[Mich. 5 W. & M. B. R.]

4 Mod. 249.
Intention is in
some cases tra-
versable. Skin.
397. S. C.

AN action was brought by the plaintiff, an executor, on a covenant in an assignment of a lease, for quiet enjoyment free and clear, and freely and clearly discharged, or otherwise indemnified of and from all arrears of rent, &c. And the plaintiff assigned a breach, that so much rent was in arrear; the defendant to part pleaded payment to the lessor, and to the rest of the rent alleged to be in arrear, that he left money in the hands of the plaintiff *ea intentione quod solveret* to the lessor; and upon demurrer Mr. *Northey* objected that the plea was not good, because the intention was not traversable. *Holt, C. J. contra*: In some cases the intention is traversable, as if *A.* be indebted to *B.* by obligation, and by simple contract, and pays money to *B.*, the intention to which debt it shall be applied is traversable: And the Court inclined that this plea was good; but held clearly, that if it had been *reliquit ad solvendum* it had been good, and that *non reliquit modo & forma* had been a good traverse: But the Court took exception

exception to the assignment of the breach, for that the plaintiff did not shew a disturbance in the enjoyment, or other special damnification, without which the rent being behind, is not a breach of the covenant, *Tollard's case*, 1 *Ro. Abr.* 433. and took this diversity, viz. Where the counter-bond or covenant is given to save harmless from a penal bond before the condition broken, there, if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless, does by this become liable to the penalty, and so is damnified, and the counter-bond forfeited; but if the counter-bond be given after the condition of the obligation be broken, or to save harmless from a single bill without a penalty, there the counter-bond cannot be sued without a special damnification. So here, rent remaining in arrear, and not paid, is not a damage, unless the plaintiff be sued or charged; and if paid any time before such damage incurred by the plaintiff, it is sufficient.

2 *Dan. Ab.* 55 pl. 8. Where bond or covenant to indemnify is made before condition of the first bond broken, it is forfeited by the breach; otherwise if given afterwards or to indemnify against single bill. *Sav. 91. Vide Com. Dig. Plead. C. 48. 2d seq. 1 ed. vol. 5. p. 352. 1 Roll. 433.*

3. *Green versus Horne.*

[*Paſch. 6 W. & M. B. R. Intr. Trin. 5 W. & M. Rot. 831.*]

IN *covenant* the plaintiff declared, that *A.* being indebted to him, and arrested at his suit, the defendant, in consideration that he would order the bailiff to let *A.* go at large, undertook and covenanted with the plaintiff to bring in the body of the said *A.* and deliver him into the custody of the said bailiff, such a day, &c. The defendant prayed *oyer* of the deed, which was, *I* (the defendant) *do promise and engage myself to bring in the body of A. to the custody of B. bailiff, such a day;* and thereupon it was demurred. *Et per Cur.* first, The plaintiff cannot set forth matter of fact in his declaration not contained in the deed itself, so as to alter the case; therefore, all such matter of fact so alleged or averred is immaterial. 8 *Rep.* 151.

Master out of the deed, that alters the case, cannot be averred. *Comb. 219. S. C.*

2dly, The plaintiff is no party to the deed, nor so much as named in it, and though covenant may be brought on a deed-poll, yet the party must be named in the deed. 1 *Roll. Ab.* 517.

2 *Jon.* 202.
3 *Keb.* 830.
2 *Lev.* 22, 10.
2 *Salk.* 457.

Post 214. H. cannot bring covenant unless named in the deed. *Cro. Jac.* 505, 506.

4. *Brewster versus Kitchell.*

[198]

[*Hill. 9 Will. 3. B. R. 1 Ld Raym. 317. S. C.*] *Bailey v. de Cumber*

THIS was a feigned action on the case upon a wager, in order to settle a difference about the deduction of taxes out of a rent-charge. Upon *non assumpsit* pleaded, the

Carth. 438. 30. 2. 7.
5 *Mod.* 368.
Covenant to deduct charge from

arec. extends to
subsequent taxes
of the same na-
ture; not of dif-
ferent nature.
Post 615. S. C.
Comb. 424,
466. 3 Saik.
340. Cases B. R.
166. Holt 1-5,
669. 2 Lev. 63.

the jury found a special verdict, viz. that *A.* being seized of lands in fee, by deed dated 1649, granted a rent-charge to one *Brewster* and his heirs, and covenanted for farther assurance; and on the same deed there was an indorsement, that the rent was to be paid clear of all taxes. Afterwards *A.* confirmed the grant, and covenanted to pay the rent-charge clear of all taxes. By the land-tax 3 *W. & M.*, 4 s. per pound is laid upon land, and power given to the tenant to deduct 4 s. in the pound, with a proviso not to alter covenants or agreements of parties. *Et per Cur.*

Post 221. 2 Inst.
76, 77. Comb.
211.

Such a covenant, if made in the year 1640, would not have freed the rent-charge from the taxes imposed by these acts; because there was no parliamentary tax in being, or known at that time; but because there were such taxes in the year 1645, which was before the grant, therefore this covenant must be construed to extend to them; for otherwise it would signify nothing (*a*): And *Holt*, C. J. held in this case,

Grantee of rent-
charge cannot
bring covenant
against an as-
signee of the
land. N.B. That
was his own opi-
nion only, the
other three hold-
ing that the co-
venant charged
the land. With
regard to which,
vide the report
in *Ld. Raym.*

1st, That the heir of the grantee could not maintain an action of covenant against the assignee or lessee of the grantor; but only against the grantor and his heirs; for a warranty, though a covenant real, does not bind the land till judgment had in a *warrantia charta*, much less that which is only a personal covenant. An assignee of land may have covenant against the covenantor and his heirs, where the covenant runs with the land. 42 *E. 3. 5. 5 Co.* *Spencer's case*; but covenant will not lie merely against one as assignee of land. *Hard. 87. pl. 5.*

Diversities where
a covenant is
avoided by sub-
sequent statute,
and where not.
Post 615. Cro.
Car. 221. 1 Jon.
245. Dyer 257.
1 Lev. 109.
3 Mod. 374.

2dly, Where the question is, Whether a covenant be repealed by act of parliament? this is the difference, viz. where *H.* covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant: So if *H.* covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed (*b*). *Vide Dyer 27. pl. 278.* But if a man

542. (*a*) *R. Marchioness of Blandford v. Duchess of Marlborough*, 2 *Atk.* 558, that an annuity agreed to be paid without deduction or abatement, for any taxes imposed or to be imposed, parliamentary or otherwise, is not subject to a subsequent land-tax. So a rent granted without any deduction, defalcation, or abatement in any respect whatsoever, *Bradbury v. Wright, Doug.* 624. So where it was enacted that

certain embankments should be free from all taxes and assessments whatsoever, *Williams v. Pritchard*, 4 *T. R.* 2. *R.* that the property mentioned in that act should not be subject to a subsequent tax for repairing and cleaning the streets, *Eddington v. Norman*, 4 *T. R.* 4.

(*b*) *R. contr.* 3 *Mod.* 39. but the opinion in this case seems more consonant to law and reason. If the act of parliament

Covenant.

† 198

man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant.

parliament does not make the thing lawful, 2 *Eq. Ca. Ab.* 26. 3 *Bro. Par.* unlawful to its whole extent, it must *Ca.* 401.
be performed as far as it continues

5. Northcote *versus* Underhill.

[199]

[Mich. 10 W. 3. B. R. 1 *Ld. Raym.* 388. S. C.]

IN *covenant* the plaintiff declared, that the defendant by his deed did grant, bargain, and sell to the plaintiff and his heirs, provided that if the grantor paid so much money, it should be lawful for him to re-enter, and that he covenanted to pay the said money to the plaintiff; and a breach was assigned in non-payment of the money: After judgment by default, and a writ of inquiry executed, Mr. *Cartwright* objected, that nothing passed by the deed for want of enrolment, *quod fuit concessum*; and from hence he inferred, that the covenants were void, like the case in *Raymond* 27., where *H.* grants all the residue of his term, which should be unexpired at the time of his death, and covenants for quiet enjoyment, and gives a bond to perform that covenant, and it was held that the bond and covenant were void. *Ex hoc fuit concessum per Holt, C. J.*, because that was a relative and dependent covenant. It refers to an estate, and is to wait upon it; and if there be no estate granted, the covenant fails (a); but in this case the covenant to pay the money is a distinct, separate, and independent covenant, and it is not material whether any estate passed, and the plaintiff need not shew it, nor say *quod defendens concessit*, but the best way is to declare with a *quod cum testatum existit, &c.*; and judgment was given for the plaintiff.

Where a conveyance of land is void, so as no estate passes, all dependant covenants are void also; otherwise of covenants independent.
Raym. 27.
1 *Keb.* 130,
164, 183.
1 *Lev.* 46.
3 *Lev.* 197.
Holt 176. S. C

(a) *Vide Webb v. Russell*, 3 *T. R.* *Russell v. Stokes*, 1 *Hen. Bl.* 562.
393. *Stokes v. Russell*, 3 *T. R.* 678.

6. Grescot *versus* Green.

[Pas. 12 Will. 3. B. R.]

LESSEE covenanted for him and his assigns to rebuild and finish a house within such a time, and after the time expired the lessee assigned over the premises, the house not being built and finished according to the cove-

Assignee is not liable for breach incurred before assignment.
Goult. 129.
Cro. El. 457.

Meas. 399, 400.
pl. 523. Holt
177. S. C.

nant. *Et per Holt, C. J.* This covenant shall not bind the assignee, because it was broke before the assignment; *aliter* if broke after, as if lessee had assigned before the time expired (a).

(a) *R. acc. 3 Bur. 1271. 1 Bl. Rep. 351.*

[200] Courts and Jurisdictions inferior.

1. Groenvelt *versus* Burwell.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 213. S. C. Comyns 76. S. C.]

Ante 144. Post
263, 396. Power
to examine, hear,
and punish, is a
judicial power.
3 Salk. 265.
S. C. Carth.
421, 491. Cases
B. R. 245, 386.
Holt 184, 395,
536.
Vide ante 148.
Post 396.

Court having
power to fine
and imprison, is
a court of re-
cord. Far. 128.
11 Co. 43. b.
Fins. Nat. Br.
73. b. 3 Bl.
Comm. 24.

BY the charter of the college of physicians, *London*, the censors are empowered to have the government of all persons practising phylic in *London*, and within seven miles round, with authority to punish *pro mala praxi* by fine and imprisonment; and accordingly they condemned Dr. *Groenvelt* for administring *insalubres pillulas & noxia medicamenta*, and fined and imprisoned him; and the question was, Whether a *certiorari* lay on such a judgment? *Et per Holt, C. J.* Wherever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges: And wherever there is a jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record. 8 Co. 60. 38. This appears from the stat. *Westm. 2. c. 11.* by which it is enacted, that auditors assigned by the lord may commit the party accountant to prison for arrears: And it is held, that the very lodging of this power in them made them judges of record: *Nulla curia que recordum non habet potest mandare carceri.* And whereas before that statute, in an action of debt for such arrears, the defendant might wage his law, since that statute he cannot, because they are a debt arising by matter of record.

2. *Rex versus Gilbert.*

A *Presentment* in a court-leet for a nuisance was removed by *certiorari*, and *Solby* took an exception to it, that it was not shewn *coment*, nor *quo jure* this court was held, whether by patent or prescription, which he urged ought to be done, for that the leet is not of common right, but is taken out of the tourn, and the tourn is of common right; such derivation therefore must be either by grant or prescription: But the Court over-ruled the objection, and said the precedents were all in this manner.

In a presentment in a leet it is not necessary to shew coment, nor quo jure, the Court is held. Vide ante 40. 1 Lill. 366. Cro. Car. 46. Cases B. R. 4. S. C.

3. Anonymous.

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[Pas. 1 Ann. B. R. 2 Ld. Raym. 476. S. C.]

IF a jury in an inferior court will not agree on their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, till they agree, and the steward may from time to time adjourn the court till they do agree. Generally a *levari facias* is not the process of the hundred court, but by custom it may be, and all hundred-courts have this custom; but the true process at common law is *disfringas*. All misdemeanors in judicial officers are a contempt of the Court of B. R., and attachments go daily against stewards, for granting attachments against all the party's goods. And *Holt*, C. J. remembered a case of the Mayor of *Hereford*, who gave judgment for his own lessee in ejectment: But for error in judgment a judge is not punishable. All this was held by the Court on motion for an attachment against a steward for discharging a jury before they gave a verdict.

Proceedings in inferior courts. Far. 1, 44. Lutw. 588. Cumbr. 124. 2 Lev. 81.

All misdemeanors of judicial officers are contempts of B. R. Far. 2. 1 Lev. 288. 1 Vent. 66, 67. Raym. 186. 1 Mod. 44. 2 Keb. 635. Far. 1, 38, 84. Post 396.

4. *Domina Regina versus Hill & al.*

[Trin. 1 Ann. B. R.]

JUDGMENT was given in the town-court of *Bristol*, and costs taxed, and a *scire facias* taken out against the bail, and a year afterwards the Court granted a new trial, and set aside the first judgment, and an attachment was granted against the judge for this cause.

Far. 84. Attachment against a judge of a corporation court. 2 Salk. 650. S. C. Post 550. S. C. 3 Salk.

363. Holt 421. Vide Str. 123.

5. Lucking *versus* Denning.

[B. R.]

Officer executing process of inferior courts is justified, tho' the cause be out of the jurisdiction, unless it appear to be fo.
1 Saund. 98.
Holt 136. S. C.

CASE against a serjeant at mace for the escape of one in custody by virtue of a process of the court of the sheriffs of London, in an action of debt upon a bond sued there; and upon *non cul.* it appeared that the bond was made out of the jurisdiction of the court; and thereupon it was objected, That the proceeding upon the bond was *coram non judice*, and all void, and the serjeant was a trespasser; and they cited 2 Bulst. 64. 2 Mod. 30. 1 Ro. 545, 809. 1 Sid. 125. 1 Lev. 95. Hob. 267. Lut. 935, 1560. 2 Mod. 196. March 117. Stat. Westm. 1. c. 35. Et per Holt, C. J. To which Powell and the rest agreed,

2 Lut. 1565.
5 Mod. 335.

1 Vent. 88.
181.

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1st, Where an inferior jurisdiction is confined to persons, as the *Marshalsea* was to those of the household, if it appears on the face of the declaration, that the persons that sue are qualified to sue, though in fact they are not; yet if the defendant does not plead to the jurisdiction, but comes in and admits it, he shall never take advantage of this afterwards, but is estopped and concluded (a): But if it is not averred in the declaration that the person is qualified to sue, and within their jurisdiction, all the proceeding is void, and *coram non judice* and trespass lies against the officer.

1 Lill. 370.

2dly, Where the inferior jurisdiction is confined to some particular things, and the suit there is for something else, of which they have no jurisdiction, all is void, and by no admission can be made good.

3dly, Where they are confined to place, viz. to all contracts arising within such a district, though the contract arise out of the district, yet the Court may award process, and the officer may execute it, unless it appear to him that it arose *extra jurisdictionem*; as if this bond had been dated at York, and that was the case, 1 Roll. 809., but he is not bound to inquire, either whether there be a cause of action, or where it arose, and may proceed in his duty, unless the contrary appear to him (b). Et nota; The plaint is general without any averment, *quod fuit infra jurisdictionem*, but that is supplied by the Court (c); and if a matter arises *extra jurisdictionem*, and the plaintiff declares of it as *infra jurisdictionem*, the defendant may plead to the jurisdiction of the Court, and if that be over-ruled, may

1 Vent. 181.
2 Roll. 117,
l. 30.

(a) R. acc. 2 Mod. 273. 1 Mod. Cowp. 18. Com. 153. 2 Mod. 30. 63, 81.

(c) Quere, If court was not originally an erratum for count?

have

have a prohibition on the statute of *Westminster*: But if he waives that, and pleads to the merits, he can never then have a prohibition, nor can he take advantage of their want of jurisdiction, for by the averment of the count, and his own admission, he is estopped to say that it was a matter that arose out of their jurisdiction. It is impossible the court should know where a transitory matter arises, unless the defendant acquaints them with it (a). Judgment *pro quer.*

Where a matter is averred to be within the jurisdiction, the defendant must plead to the jurisdiction; otherwise he is estopped. Vide ante 93. pl. 2.

(a) *R. acc. Higginson v. Sheif, Comyns*, 153. that a plea of the cause of action in the inferior court arising out of the jurisdiction of that court was bad. Vide note to title *Escape*, post 274.

Customs.

[203]

1. Lovelace's Case.

[Trin. 12 Will. 3. B. R.]

ERROR upon a judgment in the court of *Canterbury*: The exception was, that the court was laid to be time out of mind, and the process of the court also was laid to be time out of mind, which they said was making one immemorial thing subsequent to another; *sed non allocatur*, for customs may be time out of mind, and yet not co-eval. Vide 2 *Keb.* 721.

2. Mayor, &c. of Winton *versus* Wilks.

[Pas. 4 Ann. B. R. 2 Ld. Raym. 1129. S. C.]

AN action on the case was brought by the corporation of the city of *Winchester*, wherein they declared, *quod cum Winton est antiqua civitas*, and that there was a custom there *quod non liceat alicui prater homines liberos de gild. mercatoria civitatis predict.* to exercise a trade in the said city, unless being brought up an apprentice to it within the said city; that the defendant nevertheless did exercise, &c. Upon motion in arrest of judgment the cause was set down.

Custom that none shall trade in a town besides persons free of the gilda mercatoria there. Qu. Whether valid in any place except London? 11 Co. 53. 2 Leon.

262. *Palm.* 7.
2, &c. 6 *Mod.*
21. *S. C.*
3 *Salk.* 249.
Holt 187.

8 *Co.* 125.

1 *Lev.* 87.
2 *Keb.* 366.
1 *Sid.* 269, 367.
2 *Show.* 210.
1 *Saund.* 311.
2 *Lev.* 33, 206.

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Cart. 68, 114.
Mod. Case 27.
1 *Lev.* 262.
Da. v. Abr. 734.

Difference as to
this custom be-
tween London
and other cities.

The action
ought to be
brought by the
guild.

in the paper, to the end it might be determined whether there could be such a custom in any city but *London*. For the plaintiff it was urged, that there might be such a custom in *London*, and that this was settled in *Wagoner's case*: And they said that the reasons of *Wagoner's case* might as well maintain such a custom in *Winchester* as in *London*; and that though the customs of *London* are confirmed by acts of parliament, yet those acts extend only to good customs, for bad customs are void, and cannot be confirmed: They said a reasonable commencement might be intended, and cited *Palm.* 2, 3, 4, 5. 2 *Cro.* 803. 1 *Leon.* 26. *Reg.* 105. 11 *Co.* 53. On the other side it was urged, that of common right every man had liberty to trade; that he could not restrain himself from this liberty even in a particular place without a consideration, because trade was a great benefit to the public, and the party's means of livelihood, and therefore custom could not put such a restraint upon the party, and ought not to be permitted to do it, unless it gave him a consideration, or some equivalent.

Holt, C. J. Notwithstanding *Wagoner's case*, such a custom and a by-law upon it came in question in the 19 *Car.* 2. in *C. B.* in the case of the town of *Colchester*, and was not determined. All people are at liberty to live in *Winchester*; and how can they be restrained from using the lawful means of living in a place where they have a lawful liberty to live? This was the foundation and the cause of making the statute 5 *Eliz.* Such a custom is an injury to the party, and a prejudice to the public. The case of *London* differs; they have by custom the bringing up of the youth of the city, and therefore they by custom have power to make infants apprentices, to assign apprentices, and by custom after such apprenticeship they are free: Other cities have no such custom (a). 2dly, This declaration is naught: The action ought to be brought by the *gilda mercatoria*: How is the city prejudiced? Anciently the king's grant to have *gildam mercatoriam*, made the whole town to

(a) It may be collected from many subsequent authorities, that such a general custom is a good one. In *Bod- quie v. Fennel*, 1 *Wils.* 233. that point is agreed by the Court, though the judgment turned on the penalty of a by-law to enforce it being given to a stranger. A case of *Ellington v. Cbe- nery*, 9 *Gro.* 2. is there cited, in which it was determined, that a custom to exclude foreigners was good. In *Woolley v. Idley*, 4 *Bur.* 1951. such a

custom, as applicable to a particular trade, is expressly adjudged to be good; and Lord *Mansfield* says, "it is warranted by a vast number of cases." And there seems to be no ground on which it could be supported with regard to a particular trade, that does not apply to the general custom; but a by-law to exclude, without a custom to support it, is void. *Comyns*, 148. 3 *Bur.* 1856.

have

have a corporation : But *non constat* to us whether the guild here be the whole town, or part of the town, or what part of the town, nor by what right there is any *gilda mercatoria* in this place. *Powell, Powys, and Gould* concurring, judgment was given *quod nil capiat, &c.* for this fault in the declaration.

Damages. *Vide Costs, 193. See [205]*
 Mr. Serjeant Sayer's *Treatises of Damages and Costs.*

1. *Cone versus Bowles.*

[Mich. 2 W. & M. B. R.]

REPLEVIN against three defendants, one of whom was an infant, and all appeared and avowed by attorney. Judgment being given against the plaintiff, he brought a writ of error, and assigned the infancy of one of the defendants for error: And because he might have pleaded this in abatement to the avowry, it was held well enough, and judgment was affirmed; but the Court held the avowants should have no costs; for all statutes that give costs are to be taken strictly (a), as being a kind of penalty, and the statute 3 H. 7. c. 10. mentions only writs of error brought by any defendant or tenant (b).

Carth. 122, 219.
 S. C. 4 Mod. 7.
 Statutes that give costs are to be taken strictly.
 1 Show 13, 165.
 2 Saund. 212.
 Comb. 100.
 Cases B. R. 1.
 Holt 358. Ante 93.

- (a) *D. acc. Rep. B. R. temp. Hard.* whereby costs are given against plaintiff or demandant suing error; and 357.
 (b) *Vide Stat. 8 & 9 W. 3. c. 11. vide Doug. 709. n.*

2. *Lawson versus Storie.*

[Hill. 5 W. & M. B. R. 1 Ld. Raym. 19. S. C.]

BY the statute 2 W. & M. sess. 1. cap. 5., treble damages and costs are given against the rescoufer of a distress for rent. In an action upon the case for a rescous

2 Inst. 289. By 2 W. & M. sess. 1. c. 5. the plaintiff shall re- upon

cover treble costs as well as treble damages. Carth. 321. S. C. Skinn. 555. Holt 172. S. C.

upon this statute, the plaintiff shall recover treble costs as well as treble damages; for the damages are not given by the statute, but increased, an action upon the case lying for a rescous at common law (a).

(a) R. acc. 10 Co. 116. Dyer 159. Vide Cowp. 368. 1 T. R. 72. 2 Wils. b. 1 Vent. 22. 4 Leon. 36. Str. 1048. 91.

3. Herbert *versus* Waters.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. 59. S. C.]

Carth. 362. S. C. 5 Mod. 118. 76, 77. Upon a nonsuit in replevin for a poor's rate, if the jury omit to inquire of damages, that may be supplied by writ afterwards. 10 Rep. 118. Plowd. 408. Cro. Car. 143. Dyer 135. Com. 344. Skin. 395. Holt 191. Cases B. R. 85.

* [206]

1 Sid. 246.
1 Keb. 882.
Raym. 124.

IN replevin the defendant avowed as overseer of the poor for a distress for a rate upon the 43 Eliz. c. 2., and at the trial the plaintiff was nonsuit; and no damages being found, *Winnington* moved for a writ of inquiry of damages to supply this omission, and it was granted; because if the jury had inquired, they had inquired as an inquest of office, on which no attainder would have lain (b). Vide 1 Cro. 146. 1 Ro. 272. 2 Ro. 112. 1 Sid. 380. And they distinguished this from the case 1 Sid. 380. of an avowry for a rent-charge according to the 17 Car. 2. c. 7. There a writ of inquiry was rightly denied, for by that statute * the same jury are to inquire of the rent arrear, and the value of the cattle; but the statute of the 43 Eliz. does not tie it up only to the same jury. And *Holt, C. J.* said, that 17 Car. 2. *inter Burton and Robinson*, detainee was brought; and upon trial of the issue the jury found the damages, but not the value of the distress; and the Court granted a writ of inquiry, which he said was contrary to *Cheyney's* case, and as he thought contrary to law.

(b) R. acc. Rep. B. R. temp. Hard. 139. 2 Bl. Rep. 921. 3 Wils. 442.

4. Shore *versus* Madisten.

[Trin. 9 Will. 3. B. R.]

Where the statute gives a certain penalty to the party grieved, he shall recover costs; otherwise of informer. Cro. Car. 563. 1 Vent. 133. 134. 10 Co. R. Pittard's Case. 3 Lev. 374.

THE plaintiff brought debt in *G. B.* upon the statute 5 Eliz. c. 9., for not appearing upon a *subpœna ad testificandum*, and recovered judgment, with costs of suit; and upon this judgment error was brought in *B. R.* And the Court held, that where a statute gives a sum certain to the party grieved, he shall in consequence have costs, because he had a right of action antecedent to the bringing of the action. But where a sum certain is given to a stranger, as where it is to him that shall prosecute, he shall not have his costs; for till he commenced his action, he had no right

right of action in him: And the judgment was affirmed. *Vide* 1 *Brownl.* 66. *Hutt.* 22. 1 *Lut.* 201. No costs shall be in a popular action, be the penalty certain or uncertain; but where the party grieved shall have a penalty certain, he shall have costs (a).

Cro. Car. 559,
560. 1 *Jon.*
447. *Lut.* 200.
Skin. 363.
5 *Mod.* 355.
S. C. Comb.
449, 458.

(a) *R. acc.* 1 *H. Bl. Rep.* 10. *Vide* *Hullock* on Costs 205.

5. Browne versus Gibbons.

[*Hill.* 1 *Ann. B. R.* 2 *Ld. Raym.* 831. *S. C.*]

THE plaintiff brought an action on the case for slanderous words spoken of his wife, viz. that she was a whore, *per quod* he lost such and such customers. Upon not guilty the jury found for the plaintiff, and gave damages under 40 s. And the question was, Whether the plaintiff could have full costs, notwithstanding the 21 *Jac.* 1. c. 16. ? *Et per Cur.* The plaintiff shall have his full costs; for it is not (b) the words, but the special damage, which is the cause of action in this case; and upon evidence it is not sufficient to prove the words, but he must prove the special damage also; and this is the reason why the action lies by the husband alone, without the joining of his wife: And the Court held, that if a man brings trespass for beating his servant *per quod servitium amisit*, it is not an action of assault and battery within 22 *Car.* 2. c. 9. but this is an action founded upon the special damage. So in the principal case the action is for the damage and not for the words, for they alone are not actionable; and the Court agreed the case, 1 *Cro.* 140., that in an action for slander, his title the plaintiff shall have his full costs. *Nota, Mich.* 5 *Car.* 1. *C. B.*, it was said by *Richardson* to be the resolution of all the justices of *B. R.* and *C. B.*, that in an action upon the case for slander, though the Court are bound by 21 *Jac.* 1. c. 16., and cannot increase the costs where the damages are under 40 s., yet the jury are not bound by that statute, and therefore they may give 10 l. costs where they give but 10 d. damages.

Far. 129. *S. C.*
In case for
words, with spe-
cial damage, the
plaintiff shall re-
cover full costs,
though the da-
mages are under
40 s. *Post* 208.
3 *Keb.* 184.

Cro. Car. 141.
Palm. 530, 531.

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Cro. Car. 163,
307. 1 *Jon.*
196. 2 *Vent.*
36. Court are
bound by the
cause of 21 *Jac.*
1. c. 16. *Jury*
not.

(b) *R. acc.* *Str.* 645. *Andr.* 375. Upon the same principle it is held, that the statute of limitations does not attach where special damage is the gist of the action; but where the words

are in themselves actionable, special damage will not take them out of the statute. *Vide* *Bull. Ni. Pri.* 11. *Vide* alio 2 *Ld. Raym.* 831, 1588. 2 *Bl. R.p.* 1062. *Str.* 936. 3 *Bur.* 1688.

6. Jenkins & Ux. *versus* Plum.e.

[Hill. 2 Ann. B. R.]

Mod. Cases 91,
181. Husband
and wife declare
upon an indebi-
tat. assumpsit
to them as exe-
cutors, on a
cause arising af-
ter testator's
death, upon a
nonfuit they
shall pay costs.
4 Mod. 244.
2 Cro. 361, 229.
3 Lev. 189.
3 Lev. 60. Hut.
78. Latch. 220.
1 Vent. 209.
2 Lev. 165.
2 Jo. 47.
1 Vent. 92.
Yelv. 168.
3 Leon. 152.
3 D. 376. p. 26.
S. C. 3 Salk.
105. Holt 313.
Rep. A. Q. 174.
Debtor pays tes-
tator's debt to A.
with executor's
consent, it is af-
sets; without his
consent, it is not
assets; unless he
brings an action
and recovers, and
then it is assets
before execution.
Post 214. tit.
Executor. Hob.
20, 283, 36.

INDEBITATUS assumpsit by husband and wife executors, who declared *quod cum* the defendant was indebted to them in 20*l.*, as executors of the last will and testament of J. S., for money had and received to their use as executors, he promised to pay, &c. To this *non assumpsit* was pleaded, and the plaintiffs were nonsuited at the trial. And now the question was, Whether they should pay costs upon the statute 23 H. 8. cap. 15. ? *Et per Cur.* The plaintiff shall pay costs, for the receipt being since the death of the testator, if it was by the consent of the executor, it is the receipt of the executor. On the other side, if it was without his consent, yet now the bringing this action is a consent. As to the naming themselves executors, it is only to deduce their right, and set it forth *ab origine*; yet nevertheless the cause of action arises entirely in his time, and since the death of the testator. It is only by construction that an executor is out of the statute of 23 H. 8., and the reason is, because he is not privy to the original cause of action, but in this case he is (a). If the defendant received this money by the consent or appointment of the plaintiff, it was assets in his hands immediately; if without his consent, yet the bringing of the action is such a consent, that, upon judgment obtained, it shall be assets immediately without execution; and yet if an executor brings an action and recovers judgment, the money recovered is not assets till levied by execution; but in the principal case it is assets immediately; and the reason is, because it is recovered against a person that never was indebted to the testator, and the original debtor is discharged; but here the matter is at large again by the nonsuit, and the executor may sue either the first or second debtor. In this case was cited the case of *Elwes versus Mocatoe*, Pas. 2 Ann. (b), in this court. Executor brought

(a) *Vide acc. Nicholas*, administrator of *Wildborn*, v. *Killigrew*, 1 Ld. Raym. 436. *Goldbwaite* and Wife, executrix, v. *Petrie*, 5 T. R. 334. *Hullock* on Costs, 174. From all the authorities upon the subject it appears, that an executor's exemption from costs depends upon the question, Whether he was obliged to sue as executor or not; and that if he could sue *in jure proprio*, he is not protected from payment of costs by naming himself

executor. *Vide* also *Str.* 682, 1106. 1 *Barnes* 103. *Com.* 162. 2 *Barnes* 106, 122. *Andr.* 357. *Rep. B. R. temp. Hard.* 204. 4 T. R. 277. 5 T. R. 234. With respect to an executor's liability to costs in interlocutory proceedings, *vide* note to *Eaves v. Mocatoe*, post 314. Where executors are liable to costs in the original action, they are liable in error, *Williams v. Brabam*, 1 H. Bl. 566. (b) Reported post 314. cited 1 H. Bl. Rep. 102.

an action, and declared on an *infirmul computasset* with himself, and was nonsuit, and the defendant could have no costs, which the Court now agreed, because the promise upon the *infirmul computasset* begat not a new cause of action, but ascertained the old cause of action, which remained still the debt of the testator.

Holt, C. J. said, that if the goods of the testator be taken and converted before they come to the hands of the executor, he shall not pay costs upon a nonsuit in an action brought for these goods, for they were never assets (a).

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Account with executor begets not a new cause of action, but ascertains the old. 1 Ven. 94, 166. Cro. El. 218. Cro. Car. 29. 3 Lev. 60, 375. 6 Mod. 92.

(a) *R. Cockerill v. Kynaston*, 4 T. R. 277. that where a husband and wife executrix sued in trover, the first count on a trover and conversion in the tes-

tator's life-time, the second on trover before and conversion after his decease; and the third on both after, and were nonsuit; they were not liable to costs.

7. Ven versus Phillips,

[Pas. 2 Ann. B. R.]

TRESPASS for chasing, driving, and wounding his sheep, *per quod* some died, and others were damaged; and also for taking and carrying away one hog of the plaintiff: upon not guilty, the jury found the defendant guilty of all but the taking and carrying away the hog, of which they found him not guilty, and gave 2 *d.* damages; and the question was, Whether the plaintiff could have more costs than damages? And the Court, upon opening the matter, held the plaintiff should have his full costs, for this is out of the statute 22 & 23 Car. 2. c. 9., and the reason is, because the statute enacts, that in all actions of trespass, assault, and battery, and other personal actions wherein the judge shall not certify an assault and battery sufficiently proved, or that the title of the land came in question, there shall be no more costs than damages, where the damages found are under 40 *s.* So that though the first words are general, yet (by the last words) *actions* is restrained to such wherein there can be such certifying of the battery, or the like (b): Therefore if it be an action wherein

In trespass for taking, driving, and wounding his sheep, the plaintiff shall have full costs.

Construction of the stat. 22 & 23 Car. 2. c. 9. Ante 206. Smith and Bat-

(b) According to the construction which has, by an uniform train of decisions, been applied to the statute 22 and 23 Cba. 2. c. 9. the doctrine of this case (*viz.* that the plaintiff is by that statute deprived of full costs where the damages recovered are under 40 *s.*, in those actions only where in a certificate of an actual battery, or the title of the land coming in question,

can be given) is fully established. The principal questions relative to this subject must arise where the injury complained of is of a mixed nature; or distinct injuries are complained of in the same declaration, on some of which such certificate can be granted, and on others not. The material distinction seems to be, that where the complaint that would alone carry costs, is a material

terton. Raym. 487. 3 Mod. 39, 40.; 2 Vent. 36, 48, 180, 195. 2 Jon. 232. 2 Bl. Rep. 854, 1751. wherein there can be no such certifying, as debt, *assumpsit*, trover, trespass for taking his goods, trespass for spoiling his goods, trespass for beating his servant, *per quod servitium amisit*, it is out of the statute; but trespass *quare clausum fregit*, or trespass for riding over his ground, are

terial and substantial part of the case, and upon establishment of which the plaintiff is entitled to a verdict, he is not excluded from full costs by its being joined with a complaint for an assault or trespass. But where it is only a collateral circumstance, a matter of aggravation or a mode of committing the other injury, the costs will be no more than the damages. Thus, full costs are given in an action for breaking the plaintiff's close, and impounding his cattle, *Barnes v. Edgard*, 3 Mod. 39. So where one count was for a trespass on land, and another for carrying away a hog, *Knighly v. Buxton*, *Sayer on Costs* 39.; for a trespass in a house and consuming victuals, *Smith v. Clarke*, 2 Str. 1130.; for entering the plaintiff's close and cutting his cable, *whereby the plaintiff lost the use of his boat*, *Haines v. Hughes*, Comb. 324.; entering his close and driving his sheep or bull, *Arnold v. Thompson*, *Barnes* 119. *Thompson v. Berry*, 1 Str. 551.; bringing diseased cattle into the plaintiff's close, *whereby the plaintiff's cattle were infected*, *Anderson v. Buckton*, 1 Str. 192.; in trespass and assault for criminal conversation, *Batchelor v. Bigg*, 2 Bl. 854. 3 Wils. 319.; assault and false imprisonment, 1 Bac. Ab. 515.; assault and battery, and treading upon and spoiling the plaintiff's coals, and spoiling his standard and roller, *Milbourne v. Read*, *Barnes* 134. cited 3 Wils. 322. Where a double injury is charged, as in the preceding cases, the jury may find for the plaintiff as to the assault or trespass, and for the defendant as to the other cause of action, in which cases there are no more costs than damages, *Gilb. Eq. Rep.* 199. 1 Bac. Ab. 514. in marg. *Hullock* 84. note; *Beck v. Nichols*, 1 Str. 577. *Cotterill v. Jolly*, 1 T. R. 655.; or where there is no evidence of such other cause, a general verdict will be amended by the judges notes, *Bac.*

Et Hullock ubi supra. In the following cases it has been held that the plaintiff is not entitled to full costs: Assaulting the plaintiff and disturbing him in his quiet possession, &c. *Boiture v. Woolrick*, 1 Ld. Raym. 566.; assaulting the plaintiff, and striking his horse, by which he was lessened in value, 1 Str. 624.; breaking the plaintiff's house and keeping him out of possession, whereby he was put to great expence, and lost the use of it, *Blunt v. Milber*, 1 Str. 645.; breaking the house, making a noise, and continuing in it until the plaintiff was obliged to give the defendant a promissory note, *Appleton v. Smith*, 3 Bur. 1282. The asportation of personal property entitles the plaintiff to full costs, though complained of in the same declaration as a trespass; but no more costs than damages were allowed for digging peat, &c. and carrying away the same, the asportation being only a mode and qualification of the injury to the land, *Clegg v. Molyneux*, Doug. 780. Many cases have arisen where the plaintiff complained of an assault on his person, and also an injury to his clothes; but it seems now to be fully settled, that where the injury to the clothes is a consequence of the assault, or part of the same transaction, it will not entitle the plaintiff to more costs than damages, *Mears v. Greenaway*, 1 Hen. Bl. 295. The doctrine upon this subject is very clearly stated in the case of *Batchelor v. Bigg*, 3 Wils. 319. Vide also Mr. *Hullock's Treatise on the Law of Costs*, where the subject is fully and ably considered, and from which the foregoing cases have been extracted.

It should be observed, that in those cases where the plaintiff is not deprived of full costs by the stat. of Ch. 2. his right to them may be prevented by a judge's certificate under 43 Eliz. c. 6.

within

within the statute. *Vide* 3 *Keb.* 184, 3, 8, 9. *Raymond* 5 *Mod.* 74, 316.
487. 2 *Jones* 232. Trespass for breaking his stall in mer-
catu posita. And although trespass *quare clausum fregit* is
within the statute, yet if it go on for cutting and carrying
away his corn, it is out of the statute, unless the defendant
be acquitted thereof. *Vide* 3 *Keb.* 21, 247.

2 *H. Bl.* 3. 3 *Bur.* 1284. *Gillb. Eq. Ca.* 195.
5 *Mod.* 74, 316.
Comb. 324.
Skin. 666. *Str.*
1130. *Barnes*
189. *Carth.* 225.
Str. 534, 551.
B. R. temp.
Hard. 375.
3 *Will.* 319.

8. *Fanshaw versus Morrison.*

[*Trin.* 3 *Ann. B. R.* 2 *Ld. Raym.* 1138. *S. C.* but not *S. P.*]

UPON a *scire facias* on a recognizance in *C. B.* against
bail, the plaintiff had judgment for execution upon
the recognizance, & *quod recuperet dampna sua occasione di-*
lationis * *executionis*, upon a writ of error in *B. R.* this was
reversed, for the bail are only liable to costs of suit by the
statute, and damages by reason of the delay of execution
are not costs, nor costs of suit, but damage sustained by
being so long out of his money, which uses to be assessed
by allowing the party what lawful interest would have
come to him in the mean time; so that costs and damages
are different in this case, given for different ends, and as-
sessed by different measures (*a*).

6 *Mod.* 157,
197. *S. C. Post*
520. Upon a re-
cognizance of
bail no damages
can be given
occasione di-
lationis execu-
tionis.

* [209]

1 *Rol. Rep.*
335. 2 *Salk.*
520. 6 *Mod.*
157, 197, 159.

(*a*) *Vide* *Ld. Raym.* 1532. *Str.* 807. *Bur.* 1791.

Debt.

1. *Bellasis versus Burbrick.*

[*Mick.* 8 *Will.* 3. *C. B.* 1 *Ld. Raym.* 170.]

IN debt for rent upon a lease at will, the plaintiff must
shew an occupation; for the rent is only due in respect
thereof, and therefore it must appear to the Court when
the lessee entered, and how long he occupied. But in
debt for rent upon a lease for years, the plaintiff need not
set forth any entry or occupation, for though the defend-
ant

In debt for rent
on a lease at will,
occupation must
be shewn.

1 *Vent.* 41,
108. 1 *Mod.* 3.
1 *Sid.* 423.
4 *Leon.* 18.

H. 11. 52. Dyer ant neither enters nor occupies, he must pay the rent, it being due by the lease or contract, and not by the occupation.
 14. 1 L. 11. 11.
 213. S. C. N. L.
 66. Holt 199.
 Vide Doug. 454.
 Eaton v. Jaques 40. 1 Hen. Bl. 433. 4 T. R. 94. Auriol v. Mills.

2. Jayson *versus* Rash.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1212. S. C. by the names of Tyfon *v.* Paske.]

Debt lies for Sheriff's fees of executing *elegit*.
 Post 331, 333.
 Lat. 17, 51.
 Noy 75. Poph. 173. Mo. 853.
 Holt 318.

THE sheriff brought debt for his fees of executing an *elegit*; and Holt held that it lies, for it is all the execution the plaintiff in the original action can have on this judgment, and he may enter on the land extended, if he can, without force. *Vide* 1 Cro. 286.

3. Anonymous.

[Trin. 11 Ann. B. R.]

1 Sid. 330.
 Debt on judgment in B. R. lies in the Marshalsea. Contra post 439. Post 404. Mod. Cases 103, 223.
 3 Vent. 7a. 1 Sid. 65, 105, 151, 180. Ante 202.

PER Curiam. Debt lies in the Marshalsea, or any other courts, upon judgments in C. B. or B. R., and upon *nul tiel record* the issue shall be tried by *certiorari* and *mittimus* out of Chancery. The judgment being the gift of the action, *quare*, How that can be alleged to be within the jurisdiction? which is necessary.

1. Zouch *versus* Thompson.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 177. S. C.]

3 Lev. 419.
 Deceit for a fine levied of ancient demesne lies against the heirs

A Fine being levied of ancient demesne lands, the lord brought his writ of deceit against the tertenant, the heir of the conusee, and the heir of the conusor, seven years after the fine levied, and declared generally, that he

was

was lord of the manor at the time of the fine levied, without shewing how or what estate he had: And it was resolved, 1st, That deceit lies against the conusee himself, as well as against the conusor, because he is equally a party to the fine, and it is the fine that works a prejudice to the lord. 2dly, That such a writ of deceit lies against the heir of the conusee or conusor; for this is a real deceit, and not like a personal wrong, *quod moritur cum persona*; for by this wrong the lord is disinherited and debarred of the perquisites arising from his court, which is a permanent injury in the realty, that by no means dies with the person of him that did it. 3dly, The lord need not shew his estate; if he was *dominus pro tempore*, it is enough; and if his estate is since determined, it must be shewed on the other side. 4thly, The five years nonclaim is nothing in this case; for a fine may establish the right of another, but cannot establish itself. 5thly, The Court held the fine to be *coram non iudice*, and merely void. 2 Leon. 290. Br. Fines 47. Br. Discent 14. 21 E. 3. 20. Hern's Plead. 93. 7 Hen. 4. 28. Vide Lut. 712.

of conusor and conusee after five years, because it was merely void. F. N. B. 98. Br. Discent, 16. Fitts. 9. 3 Salk. 35. S. C. Lut. 713. S. C. Cruise on Fines, 2 edit. 301. 2 Will. 17.

1 Ro. Ab. 387:

2. Medina versus Stoughton.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 593. S. C. 2 Ld. Raym. 1182, 1205. cited.]

CASE, for that the defendant being possessed of a certain lottery-ticket, sold it to the plaintiff, affirming it to be his own, whereas in truth it was not his but another's; defendant pleaded he bought it *bona fide*, and so sold it. *Et petit iudicium de narr., & quod narr. præd. casetur*: The plaintiff demurred. And per Holt, C. J.,

1st, Where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having possession is a colour of title, and perhaps no other title can be made out; *aliter* where the seller is out of possession, for there may be room to question the seller's title, and *caveat emptor* in such case to have either an express warranty or a good title: So it is in the case of lands, whether the seller be in or out of possession, for the seller cannot have them without a title, and the buyer is at his peril to see it. 3 Mod. 261. (a)

Show. 68. Where seller has the possession of chattels, the bare affirming them to be his makes a warranty; otherwise if out of possession. Cro. El. 44. 1 Rol. Rep. 275. 1 Rol. Ab. 91. Sid. 146. Holt 208. S. C. 3 Mod. 261. Sho. 68. Carth. 90.

* [211] Stil. 343, 348. 2 Cro. 474. Mo. 196. Such affirmation makes no warranty. Vide Ante 177.

ranty of lands in any case.

(a) The decision in this case cited and approved, but the *dictum* concerning the seller being out of possession

denied. Per Buller, J. Vide Bull. N. P. 30.

3 T. R. 57.

Judgment to answer over tho' the plea prayed jud. de narr. Post 218. 3 Mod. 281. Carth. 90, 187.

2dly, The Court took this plea, in the conclusion of it, to be in bar, but because it was safest for the plaintiff, gave judgment to answer over, saying that could not be assigned for error by the defendant, because it was for his advantage. 2 Mod. 261.

N. B. Holt said, It must not be taken as a plea in bar, because it did not begin with an *actio non*.

3. Risney *versus* Selby.

[Mich. 3 Ann. B. R.]

Deceit lies for affirming to a purchaser, that the rent is more than in fact it is, 1 Sid. 146. but not for saying J. S. would have given so much. 1 Roll. Abr. 91. pl. 8. 1 Roll. Abr. 191. pl. 16.

CASE, for that the plaintiff being in treaty with the defendant about the purchase of such a house, the defendant did fraudulently affirm the rent to be 30 *l. per annum*, whereas it was but 20 *l.*, whereby he was induced to give so much more than the house was worth. Upon not guilty pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, that this was an improper inquiry in the plaintiff, and he was over-credulous in taking the defendant's word for it; but the plaintiff had his judgment, for the value of the rent is matter that lies in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it (a).

(a) *Vi. acc.* 3 T. R. 58.

4. Butterfeild *versus* Burroughs.

[Trin. 5 Ann. B. R.]

Warranty of a horse to be sound. Want of an eye is a breach. 2 Roll. Rep. 5, 188. Bridg. 128. F. N. B. 98. K. Cro. Jac. 41, 196, 197, 387. Bridg. 127. Br. Garraty 57, 58. Fitz. Deceit 24. Skin. 104. 1 Rol. 96.

THE plaintiff declared that the defendant sold him a horse such a day and at such a place, & *ad tunc & ibidem warrantizavit equum prædict.* to be sound, wind and limb, whereupon he paid his money, and avers the horse had but one eye, &c. The defendant pleaded *non warrantizavit*; upon which there was a verdict for the plaintiff; and now in arrest of judgment it was objected, 1st, That the want of an eye is a visible thing, whereas the warranty extends only to secret infirmities: But to this it was answered and resolved by the Court, that this might be so, and must be intended to be so, since the jury have found the defendant did warrant. 2d Obj. As the warranty is here set forth, it might be at a time after the sale; whereas it ought to be part of the very contract, and therefore it is always alleged *warrantizans vendidit. Sed non allocatur*; for the payment was afterwards, and it was that completed the bargain, which was imperfect without it.

Declaration.

1. Hastrop *versus* Hastings.

[Pas. 4 W. & M. B. R.]

IN an action upon the case for beer and wages, the defendant pleaded in abatement, *et pet. judicium de billa, & quod billa predict. cassetur*, for incertainty in the declaration upon demurrer, the defendant's counsel insisted upon many faults in the declaration. *Et per Cur.* The defendant shall not take advantage of mistakes in the declaration upon a plea in abatement; but if he would do that, he must demur to the declaration, *per quod a respondeas oyster* was awarded.

Mistakes in a declaration cannot be taken advantage of upon a plea in abatement. Show. 91. 8 Co. 120. b. Co. Lit. 303. b. Hob. 233. 1 Lill. 439. Carth. 172.

2. Bennet *versus* Talbot.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 149. S. C. Comyns 26. S. C.]

TRESPASS for entering his close, and treading down his grass and corn, and hunting there, the defendant being an inferior tradesman, viz. a clothier, *contra pacem domini regis, & contra formam statuti inde provis.* After verdict *pro quer.*, it was objected in arrest of judgment, that *contra formam statuti* goes to the whole declaration, wherein several of the trespasses contained are not contrary to any statute; for the statute 4 & 5 W. & M. does only increase costs. Holt, C. J. If an act of parliament increases a penalty, or deprives a man of a benefit he had before at common law, in such case, if one declares upon the statute, and does not bring himself within the statute, and concludes *contra formam statuti predict.*, it is naught. This was *Penballow's case*, 3 Cro. 231. But if there be no act of parliament at all, and the plaintiff concludes *contra formam statuti predict.*, it is only surplusage. This was *Ward's case*, 1 Vent. 103. Here an act gives an increase of costs, and in that only restores the common law, which was taken away by the stat. 22 & 23 Car. 2. The question is now, How the plaintiff shall declare in this case? In this count several trespasses are alleged, the last whereof is only within the statute, and the conclusion of the

Carth. 382. Bennet *versus* Talboys. 5 Mod. 307. Declaration concluding *contra formam statuti* is well enough, though some of the matters are not within the stat. Ccmb. 420. S. C. Cases B. R. 121. Holt 661.

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count is *contra formam statuti*, which, though in grammatical construction it goes to the whole count, yet in law it only goes to the hunting, and therefore why may we not apply it only to the latter part, and reject it as to the rest for surplusage, as was done in an indictment in *Harwood's* case, *Al.* 43. Accordingly the Court held, that *contra formam statuti* should only be applied to the latter part which was really against the statute; and that, seeing the hunting and breaking could not be separated, the plaintiff should have his costs according to the new statute. Judgment for the plaintiff.

3. *West versus Troles.*

[Mich. 9 Will. 3. B. R.]

Two counts in
marr. for things
of the same kind
not averred to be
different; well
after verdict.
Far. 149.

THE plaintiff declared, that whereas the defendant 6 *Maii* 1695, for 120 weeks' diet then past, had promised to pay him 7 *s.* per week, and that the plaintiff *posse*, *sc.* 5 *Maii* 1695, having found the defendant diet 120 weeks then past, the defendant promised to pay the worth, and that it was worth 7 *s.* per week. Upon *non assumptis*, and verdict *pro quer.*, it was now moved in arrest of judgment, that the weeks in the *quantum meruit* are not said to be *alia* than those laid in the special promise, so that the defendant is twice charged for the same thing. *Sed non allocatur*; for they do not appear necessarily to be the same, and without necessity the Court will not intend them so.

4. *Nevil versus Soper.*

[Trin. 10 Will. 3. B. R.]

Repugnancy in
count.

IN covenant against an apprentice the plaintiff assigned for breach, that the apprentice, before the time of his apprenticeship expired, & *durante tempore quo survivit*, departed from his master's service. The defendant demurred, and had judgment, because the declaration was repugnant, for it should have been *durante tempore quo servire debuit*. The case of *Lawly versus Arnold*, *Hill.* 8 *W.* 3. *B. R.*, was not unlike this: That was trespass for taking and carrying away his timber and brick, *super terram suam jacent. ergo consecutionem domus de novo edificat*. And the Court held this insensible, for they could not be materials towards the building of a house already built. *Sed quære*, If that was not surplusage?

5. Tilsden *versus* Palfriman.

[Mich. 3 Ann. B. R.]

IF one be *in custod. mar. marefcb.*, the way to charge him with an action or an execution is thus: If it be in term-time you must file a bill against him, and deliver a declaration to the turnkey: Upon this he shall lie two terms before he be discharged, even on common bail; but if it be in vacation (*a*), the plaintiff must go to the marshal's book in the office, and make * an entry *quod remaneat in custod. ad sect. J. S.* But then he must be in actual custody, and not at liberty; because then he may be arrested. *Per Curiam.*

Post 345. Diversity between charging a prisoner in custody in term, and vacation. Mod. Ca. 253. Vide 1 Lill. 409. 6 Mod. 253. S. C. 3 Salk. 150.

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(*a*) In 2 Bur. 1050. it was laid down by the Court of B. R. that the right method of charging a prisoner in the vacation with a new suit is (like that which is taken in the Common Pleas) to file a bill as of the preceding term, and then to deliver or leave for the defendant (being in custody) a declaration as of the preceding term, and to make an affidavit thereof.

See the Case of *Crowder versus Oldfield*, Title *Jeofails*.

Deeds and Charters.

1. Nurse *versus* Frampton.

[Pas. 6 Will. 3. B. R. 1 Ld. Raym. 28. S. C.]

DEBT for 25 *l.*, and declares that, by deed between him and the defendant, it was agreed, that the gray nag of the defendant, between the day of the date thereof and the last of *August*, a day's notice being given to the plaintiff, should ride from *Hyde-Park Corner* to the first house in *Reading*, in three hours, for 50 *l.* bet on each side, on the forfeiture of 25 *l.*, and avers, that the defendant gave not a day's notice, and that the horse did not ride; the defendant craves oyer of the deed, which was, *It is agreed that a gray nag, &c. In witness whereof we have*

Where deed runs in the first person, signing and sealing makes H. a party, though not named therein.

bereunto

3 Lev. 139.
2 Salk. 457.
472, 473.
2 Lev. 22, 210.
2 Jon. 202.
1 Vent. 332.
Raym. 302.
3 Keb. 786,
814. Ante 197.
Notice dispensed
where it becomes
impossible. Ante
172.

hereunto set our hands and seals. Et nota; They were not otherwise named in the deed. Hereupon the defendant pleaded that the plaintiff absconded for felony from such a day till after the first of August, so that he could not give notice. To this there was a replication and rejoinder both impertinent, and a demurrer; whereupon it was objected, that bare setting names and seals would not make them parties, so as to have an action. Vide 2 Inst. 673. 3 Cro. 59. 2 Ro. 22. But the Court held, 1st, That the cases were not alike, and that an action would lie by the bare signing and sealing. 2dly, The Court held, that the defendant was not bound to seek the plaintiff to give notice, because the plaintiff by his own act in absconding had prevented it, and a personal notice was necessary, which could not be given. Vide 2 Cro. 46. Yelv. 37. Lat. 158. 1 Inst. 211.

1 Rol. 457.

2dly, The Court held, that though notice was dispensed with by the plaintiff's absconding, yet the defendant should have rid the horse within the time limited, and for default thereof must pay the forfeiture. Judgment for the plaintiff.

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2. Fitch *versus* Wells.

[Hill. 4 Ann. B. R.]

Upon non est
factum found
against the deed,
it may be kept
in court; other-
wise upon a col-
lateral issue.
Co. Lit. 231. b.
1 Lill. 419.
Holt 213. S. C.
Sav. 131, 170.

UPON a trial in *ejectment* the plaintiff made his title under several deeds, and after a long trial the jury found against them, and upon motion the Court ordered them to be kept in the officers' hands in order to a prosecution for forgery; but upon application to the Court of Chancery, from whence the issue was directed, a new trial being granted, the plaintiff moved to have the deeds out of court. *Holt, C. J.* held they must be delivered out as this case was, because the deeds were not in issue directly upon the pleadings in the cause; otherwise if the issue had been *non est factum*; and he remembered the case of Sir *John Hugbley*, who was sued as executor to *J. S.* upon a bond of 10,000 *l.* set up by an old woman that looked after *J. S.* an old miser, as his nurse; and upon *non est factum* pleaded, it was found upon a trial at bar not to be the deed of *J. S.*; and upon the authority of *Wymark's* case in 5 *Co.*, it was made a question, Whether the bond should not be cancelled? And it was held it should not be cancelled, because the judgment might be reversed by writ of error, but the bond should be kept in court.

5 Co. 74. b.

3. *Hill versus Aland.*

[Pas. 5 Ann. B. R.]

ACTION was brought upon a special agreement contained in a note, and a rule was made to shew cause why the plaintiff should not give the defendant a copy; but, upon cause shewed, the rule was discharged, because the contract upon which the action was founded was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copy (a):

Where the writing is only evidence, and the action not founded on it, the defendant cannot have copy.

(a) *Quære*, Whether in modern practice such a rule would not be made absolute?

Staple versus Hayden.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 922.]

TRESPASS, the defendant justified for a way, &c., and issue being joined, the cause came down to be tried at *nisi prius*. But the defendant made default, and so the inquest was taken by default; and now the issue being immaterial, the Court was moved for a repleader. *Et per Holt, C. J.* (b) The defendant is out of court by the default, and that to all purposes but this, *viz.* that judgment may be given against him; therefore being out of court there cannot be a repleader, unless the default could be waived, or the party could be brought into court again (c).

6 Mod. 1.
3 Salk. 121.
Holt 217.
Where defendant makes default at nisi prius, no judgment can be given for him, nor repleader awarded. Ante 173. S. C. Post 579. 2 Ro. Abr. 430. pl. 4.

He said in personal actions before issue joined every default was peremptory, but after issue joined the first default is not peremptory, but the second is, and this is by the statute of *Westminster, c. 27.* and *Marlbr. postquam aliquis se in inquisitionem posuerit, non habebit nisi unam defaultam*; in personal actions the first default before, and the second after issue joined, is peremptory.

(b) *Vide* note to this case, pa. 173. (c) *R. acc. Str. 47.*

1 Lev. 32.
 1 Keb. 25, 30,
 89, 90. Dyer
 117, 118.
 2 Cro. 5, 275.
 3 Cro. 227, 3.

and this *unica defalta* is always upon the return of the *venire*, and not upon the *disfringas*, for the *unica defalta* must be *ad proximum diem*, which is the day upon the *venire*. And though the defendant never appears now upon the return of the *venire*, yet heretofore the defendant was then demanded solemnly, and if he made default, there went out a *disfringas* against the jury with a clause in it to distrust the defendant; and if after this he made default again, it was peremptory, because there was no process left to fetch him in.

Where upon default after issue joined the inquest shall be taken by default, and where judgment may be given. 2 Saund. 45. 1 Lev. 105.
 6 Mod. 4, 5.
 1 Mod. 248.
 2 Show. 274.
 1 Vent. 60.
 2 Lev. 135.

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Generally, if after issue joined the defendant makes default, the plaintiff may proceed to trial, and have the inquest taken by default; but he shall not have judgment by default, unless in some special cases. In debt upon a bond, if the defendant pleads a release, and issue is thereupon joined, and at the trial the defendant makes default, the plaintiff may pray judgment by default, and the inquest need not be taken by default, for by this plea the duty is confessed, and the plea is not made good; *aliter* upon *non est factum*, for thereby the duty is denied, therefore in that case the inquest must be taken by default: But in trespass, if the defendant plead a release, and makes default, the plaintiff cannot pray judgment by default, but must pray the inquest by default; for the debt was certain, but the damages are uncertain. Long 5^o Ed. 4.

In an appeal of rape after issue joined the defendant makes default, there shall be neither judgment by default nor inquest by default, but an *alias*, *pluries*, *capias* & *exigent* shall be awarded. Vide Jenk. 68. 18 Aff. 13. 34 H. 6. 24.

Edm. 162, 161.
 Mod. Cases 4.
 Default may be waived in real actions, not in personal. 6 Mod. 2, 102. 40 E. 1. 15. 5 E. 4.
 8. 2 Salk. 579.
 1 Lev. 32.
 3 Lev. 20, 440.
 19 Ed. 4. 1.
 22 H. 6. 16.
 2 Lev. 12, 142, 164.

The plaintiff cannot waive the default here, as the demandant may in a real action. If the tenant makes default in a real action, a *grand cape* is awarded, and upon the return of it, if the demandant insists upon the default, he must have judgment final: but the demandant may waive the default, and take an appearance upon the *grand cape*; and that is regular, because the tenant comes in by process: And so it is of a default on a *petit cape*, but in a personal action there is no process to bring the party into court again: Also the day of the *nisi prius* not being the same with the day in bank, a default at *nisi prius* cannot be waived at the day in bank.

And the bar was cautioned never to make defaults at *nisi prius*, because no judgment could be given for the defendant afterwards.

Defence.

Ferrer *versus* Miller.

[Pas. 4 W. & M. B. R.]

EJECTMENT; the defendant *venit & dicit* that the land is ancient demesne, without making any defence. To this there was a special demurrer. *Et per Holt, C. J.* The plaintiff might have refused the plea for want of a defence; but if he receives the plea, he admits a defence. If one pleads outlawry, he ought to plead it *sub pede sigilli*; and if he does not so plead it, the plaintiff may refuse it; but if he accept the plea, he shall not demur for that cause; for it is well enough if he allow it.

Carth. 220.
Plea without
defence may be
refused, but is
made good by
acceptance.
3 Lev. 182.
5 Rep.
1 Brownl. 57.

Demurrer.

[218]

1. Benbridge *versus* Day.

[Hill. 3 W. & M. B. R.]

TROVER for several things, and among the rest *de duobus fulcris*: The defendant demurred, and *Holt, C. J.* refused to give judgment *quod nil copiat*; saying, The plaintiff may take several damages, and release as to this, and then take judgment as to the rest, and all would be well.

Demurrer to declaration in trover de duobus fulcris. 3 Salk. 336. S. C. Holt 191.

2. Carter *versus* Davies.

[Pas. 3 W. & M. B. R.]

Carth. 187. S. C. 1 Show. 255. Demurrer in bar to a plea in abatement, makes a discontinuance. Show. 91. Mod. Cases 195, 198. Aided by verdict.

INDEBITATUS *assumpsit* and *quantum meruit* for wares; as to the first count the defendant pleaded *non assumpsit*, and as to the second *pet. judicium de billa*, and pleads in abatement; the plaintiff took issue on the *non assumpsit*, and demurred on the plea in abatement *quod placitum predict. minus sufficien. in lege existit ad ipsum ab actione sua predict. habend. precludend. Et per Cur.* The plaintiff having demurred in bar, where the plea is only in abatement, the suit is thereby discontinued (a); but issue being joined on the other promise the court stayed proceedings on the demurrer, saying, The discontinuance would be helped by the verdict (b).

(a) R. acc. 1 *Ld. Raym.* 393. *Vide Str.* 775.

(b) R. acc. *Hen. Bl.* 644. *Vide Str.* 1022.

3. Combe *versus* Talbot.

[Mich. 5 W. & M. B. R.]

4 Mod. 254. One defendant cannot plead two pleas that go to the whole. *Aliter nunc per 4 & 5 Annæ*, for amendment of the law. *Far.* 148. *Holt* 549. S. C.

IN debt for two years rent due upon the demise of a messuage and several parcels of land, rendering 9*l.* *per annum*, the plaintiff demanded 18*l.*, defendant as to 9*l.* *parcell. inde*, being the first year's rent, pleaded *nil debet*, and concluded to the country, but there was no joinder in issue thereupon; and as to the 9*l.* residue, he confessed the demise as laid in the declaration, *reddendo annuatim 9l. viz. 40s.* for such a parcel, and 7*l.* for other parcels: and as to the 40*s.* parcel thereof, he pleaded *nil debet*, and as to the rest *nil habuit in tenementis*; the plaintiff demurred generally *quia placitum predict. &c. Et per Holt, C. J. and Eyre* (who were only in court), 1st, One defendant cannot plead two such pleas as to the whole; thus one defendant cannot plead *nil debet* and *nil habuit in tenementis*. 2dly, If *placitum* be *nomen collectivum*, which was doubted (*Vide 1 Saund.* 338. *Dyer* 325. *b.* 15 *H.* 7. 10. *b.* 3 *Cro.* 129. 1 *Leon.* 125. 1 *Sid.* 39.) then the demurrer goes to all; and then no judgment can be given for the plaintiff, because the plea of *nil debet* is a good plea. Leave was had to amend on both sides.

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Placitum est nomen collectivum. Q. Yelv. 65. Co. Lit. 303. a. 304. a.

4. Campbell *versus* St. John.

[Trin. 6 W. & M. B. R. Rot. 551. 1 Ld. Raym. 20. S. C.]

IN *trover* for a box and 290 *pecus argenti*, the defendant demurred to the declaration, and the plaintiff demurred to the defendant's demurrer, and concluded *hoc paratus est verificare*; the defendant maintained his demurrer, and put the matter upon the Court. And first, the Court held that *trover* would lie for plate generally. *Vide Style* 224, 264. 2dly, That all is discontinued by the plaintiff's not joining in demurrer, but demurring upon the defendant's demurrer; for there is no difference between pleading over when issue is offered, and not joining in demurrer, but pleading over; both are alike, and make a discontinuance.

Demurrer to a demurrer makes a discontinuance. S. C. Comb. 306, 323. Holt 156.

Ante 218. but if there be an issue as to part and a verdict, it is aided.

5. Lamplough *versus* Shortridge.

[Pas. 13 Will. 3. B. R. Comyns 115. S. C.]

IN *demurrer* for duplicity, it is not sufficient to demur, *quia duplex est*, or *duplicem habet materiam*; but the party must shew wherein; for the statute by requiring to shew cause intended to oblige the party to lay his finger upon the very point. *Per Holt, C. J. (a)*

Demurrer for duplicity must shew wherein. Lut. 4. Mod. Cases 118. Hob. 232. 1 Lill 439. 3 Salk. 141. S. C.

(a) *Vide Rule of C. B. M. 1654. Mills 29. Com. Dig. Plead. Q. 9.*

6. Anonymous.

[Mich. 13 Will. 3. B. R.]

IF there be a demurrer to part, and an issue upon other part, and judgment be given for the plaintiff upon the demurrer, he may enter a *non prof.* as to the issue, and proceed to a writ of inquiry upon the demurrer; but without a *non prof.* he cannot have a writ of inquiry, because on the trial of the issue the same jury will ascertain the damages for that part which the demurrer was. *Per Cur. (b)*

Demurrer to part, and issue to other part.

(b) *Vide acc. Str. 532.*

7. Dockminique *versus* Davenant.

[Trin. 3 Ann. B. R.]

No demurrer in
abatement. 5
Mod. 133. Mod.
Cases 194, 198.
S.C. called Doc-
manny *versus*
Davenant. Ante
218. Show. 91.

PER Cur. If a defendant demur in abatement, the court will notwithstanding give a final judgment, because there cannot be a demurrer in abatement; for if the matter of abatement be extrinsic, the defendant must plead it; if intrinsic, the Court will take notice of it themselves.

Deodand.

Case of the Lord of the Manor of Hampstead.

Where several
things move *ad*
mortem, they are
all deodands.

Mod. Cases 187.

1 Sid. 206, 207.
contra Poph.
136.

A Cart met a waggon loaded upon the road, and the cart endeavouring to pass by the waggon was driven upon a high bank, and overturned, and threw the person that was in the cart just before the wheels of the waggon, and the waggon ran over the man and killed him. In the home circuit this was referred to *Pollexfen*, C. J. and *Gregory*, and they gave their opinions, That the cart, waggon, loading, and all the horses are deodands, because they all moved *ad mortem*: *Pollexfen* at first doubted concerning the forfeiture of the cart, but looking into his common place-book he grounded his opinion upon this case: One riding upon a horse in a river, the horse threw him, and the stream carried him to a mill, and the wheel of the mill killed him; and it was adjudged, that the horse and the wheel were forfeited. If a man be thrown from his horse by the violence of the water, then the horse is not forfeited, 2 *Cro.* 483. Lord *Chandos's* case; where the inquest found him killed *per cursum aque*. It is said in the books, That if a tree shall fall upon the branch of another tree, and both fall to the ground, and the branch kills a man, the tree and branch are both forfeited (a).

(a) Deodands do not meet with a jury has found too little, the Courts countenance in *Westminster-hall*; when will not interpose in favour of the Crown,

Crown, &c. though they will, if it has found too much, in favour of the subject. Thus, if *A.* sitting on his wagon falls, the horses draw on the wagon, the fore wheel crushes his head,

and he dies; and the coroner's jury find the wheel only is the deodand, the Court will not quash the inquisition. *Foster, C. L. 266.*

Departure.

[221]

I. Gargrave *versus* Smith.

[Hill. 2 W. & M. C. B. Rot. 1639.]

TRESPASS for breaking his house, and taking and carrying away his goods; the defendant justified the taking and carrying away *nomine districtionis* for damage-feasant; plaintiff replied *quod post districtionem prad. viz. eodem die, &c.* he converted them to his own use. On demurrer it was urged, that the replication was a departure, for it does not make good the plaintiff's declaration in trespass, but shews rather that the plaintiff's should have brought trover and conversion: *Sed non allocatur*; he that abuses a distress, is a trespasser *ab initio*, and therefore if in trespass the defendant justifies *nomine districtionis*, the plaintiff may shew an abuse, and it is no departure, but makes good his declaration; and so it does in this case, for the converting is a trespass or trover at election, and the matter disclosed in the replication makes good his election; for it proves it a trespass as well as a trover (*a*).

To a justification by distress the plaintiff may reply an abuse, and it is no departure. *Yelv. 96, 97. 1 Ro. Ab. 879.*

1 Sid. 10.

2 Cio. 147.

(*a*) *R. acc. 2 Wilf. 313. 3 Wilf. 20. 1 T. R. 12.* But in case of a distress *for rent*, since the statute 11 Geo. 2. c. 19. perhaps such a replication would be a departure; as that

statute has altered the law by which subsequent irregularity made the distress a trespass *ab initio*. *Vide Bull. N. P. 81.*

2. Countess of Arran *versus* Crispe.

[Trin. 5 W. & M. B. R.]

IN debt upon a bond the defendant craved *oyer* of the condition, which was to perform covenants in an indenture of lease, wherein one covenant was to pay so

Where performance is pleaded, and matter of excuse is afterwards set forth.

at the rejoinder,
it is a departure.
Ayre 58. Caves
P. R. 52. S. C.
Holt 549.
Comb. 211.
Fid. 615.

1 Sid. 10, 11.
Co. Litt. 354.

[222]

much clear of all taxes, and then set forth the indenture of lease, and pleaded performance: The plaintiff replied non-payment of so much for half-a-year's rent: The defendant rejoined so much paid in money, and so much in taxes; upon the act of parliament for laying 4s. per pound on land, which being allowed amounted to the full. The plaintiff demurred. *Holt*, C. J. held the covenant did not extend to parliamentary taxes, for want of the word parliamentary; *Ceteri contra*, All taxes includes parliamentary: yet *per Holt*, judgment ought to be for the plaintiff, though the point of law were against him; because the matter of this rejoinder being by way of excuse ought to have been set forth in the bar; but as it is here, it is a departure; for whereas he said at first that he had performed the covenants, now he says he is not obliged to perform them. Judgment *pro quer.*

3. Primer *versus* Philips.

[Pas. 6 W. & M. B. R.]

Varying from
that which is not
materially alleg-
ed, is no depart-
ure.

TRESPASS for taking his cattle *in alta via regis* at such a place; the defendant justified the taking for damage-tenant; the plaintiff replied, That time out of mind there had been *quodam via tam equestris quam pedestris pro omnibus* inter such a place, &c. and that the defendant (a) drove his cattle over the way, and that *en passant* the cattle eat, &c. The defendant rejoined, That the cattle were commorant *in via predicta*. and issue was joined hereupon, which was found for the plaintiff. *Darnell* moved for a repleader, the trespass now tried being another trespass than was complained of, 34 H. 6. 19, 20. *Holt*, C. J. The trespass is a transitory trespass, and the mention of it in the declaration as done *in alta via* was nothing to the purpose: it was idle and out of time, and mere surplusage; and therefore the plaintiff in his replication, by following the defendant to another way, does not depart, because it was not materially alleged in the declaration; and a departure must be from something that is material (b). And when the issue is taken upon the commorancy, it admits the plaintiff had a way, but that he continued longer in it than he should. Judgment *pro quer.*

(a) This should be plaintiff.

(b) *Vide acc.* 1 Lev. 110, 143. *Cro.*
Car. 334. *Sir.* 21, 806. *Fart.* 357.

1 Sid. 228. *Hard.* 41. *Lut.* 1437.
Com. Dig. Picad. F. 11. 3d edit. 5th
vol. pa. 456.

4. *Webly versus Palmer.*

[Mich. 7 Will. 3. B. R.]

IN *trouver* the defendant pleaded a release, &c. and it was held *per Holt*, C. J. That in trespass, if the defendant plead a release before the time, he must also go on with an *absque hoc*, that he is guilty *ad aliquod tempus postea*: But if he does not vary the time, there needs no traverse; for suppose you allege the trespass to be such a day, and the defendant justifies as to that day, the plaintiff may shew another day, and it is no departure; for the defendant has occasioned this: And there is great difference between a bond and a trespass; if the declaration lays the bond to be dated on one day, the replication cannot say it was dated on another; but in trespass the plaintiff may depart according to occasion; *sed adjournatur*. *Vide prox. Casum.*

In trespass, if the defendant justifies upon the day in narr. the plaintiff may allege another day in his repl. *Lat.* 1437. *Vide* 1 Will. 81. Com. Dig. Pleading, G. 5th vol. 3d edit. pa. 446.

5. *Howard versus Jennifon.*

[223]

[Pas. 8 Will. 3. B. R. Comb. 361. S. C.]

AN *action on the case* for work done was brought by a tailor, and six several promises laid, all upon the 16th of October; the defendant pleaded *infra etatem* to all generally; the plaintiff replied as to two promises, *precludi non, &c. quia* the defendant was at that time of full age, and as to the rest, that they were *pro necessario vestitu*; hereupon the defendant demurred, alleging that this was repugnant; that the defendant could not at the same time be of full age and not of full age: but the Court held, That time was but a circumstance in nowise material, nor part of the issue; that a man is not tied to a precise day in his declaration; and if the defendant force him so vary, it is no departure. Judgment *pro quer* (a).

Declaration, of six counts, stating as many promises, and all on the same day; plea *INFRA ETATEM* generally; plaintiff may reply as to some of the promises OF AGE, and as to rest, that they were for necessities, without being a departure.

(a) *Vide Str.* 21, 806. acc.

Detinue.

Roberts *versus* Wetherall.

[Pas. 8 Will. 3. B. R.]

5 Mod. 191.
S. C. Detinue
brought for
goods forfeited.
Mod. Cases 216.
Cro. El. 367.
Co. Lit. 145. b.
Comb. 361.
Cases B. R. 92.

BY the act of navigation 12 Car. 2. c. 18. certain goods are prohibited to be imported here under pain of forfeiting them, one part to the king, another to him or them that will inform, seize, or sue for the same; and it was adjudged in this case, That the subject may bring detinue for such goods, as the lord may replevin for the goods of his villein distrained; for the bringing the action vests a property in the plaintiff (a).

(a) *Wilkins and Despart, H. 33 Geo. 3. B. R.* It being pleaded to an action of trespass for taking a ship, that it was seized by virtue of the navigation act; the plaintiff replied, that there was no judicial condemnation; to which the defendant demurred.

And this case was relied upon to shew, that the property was changed by seizing or commencing suit: the Court intimated that they could not distinguish the case from *Roberts and Wetherall*, and gave judgment for the defendant. 5 T. R. 112.

Devise.

1. Loddington *versus* Kime.

[Mich. 6 W. & M. C. B. Intr. Trin. 5 W. & M. Rot. 1557.
1 Ld Raym. 203. S. C.]

3 Lev. 431. S. C. Devise to A. for life, and if he have issue male, then to such issue male and his heirs, and if he

IN replevin a special verdict was found, viz. That Sir Michael Armin being seised in fee, devised a rent-charge, and then devises the land to A. for life, without impeachment of waste: and in case he have any issue male, then to such issue male and his heirs for ever; and if he die without issue male,

male, then to B. and his heirs for ever. A. entered and suffered a common recovery, and died without issue.

1st Question was, Whether A. was tenant in tail by this devise? *Powell* held the express estate for life not destroyed by the implication that arose on the latter words following, so that A. was only tenant for life, and the rather, because these words, *viz. impeachment of waste, and for life*, must in that case be rejected, *quod Treby, C. J. concessit* (a). 2dly, The Court held, That issue was to be taken here as *nomen singulare*, because the inheritance was annexed and limited to the word *issue*; so that the inheritance was in the issue, and not in A. the father (b). 3dly, That this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder (c), so that a posthumous son could never take (d). 4thly, That the remainder limited to the issue of A. was a contingent remainder in fee, and that the remainder to B. was a fee also: But those fees are not like one fee mounted on another, nor contrary to one another, but two concurrent contingencies, of which either is to start according as it happens; so that these are remainders contemporary and not expectant one after another (e). 5thly, The Court held that the remainder in fee to B. was not vested, because the precedent limitation to the issue of A. was a contingent fee; and they took this difference, *viz.* Where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person *in esse*, vest; but no remainder limited after a limitation in fee, can be vested (f). 6thly, That the recovery suffered by A. had barred the estate limited to his issue, that being contingent, and likewise the remainder limited to B. and his heirs, because that was contingent, not vested, and now never could vest; and * that A. had gained a tortious fee, which would be good against B. and his heirs, and likewise against all persons but the right heirs of the devisor (g).

die without issue male, to B. and his heirs. A. has but an estate for life, and both remainders are contingent.

1 Co. 66. b.
4 Mod. 282.
3 Lev. 403, 434.
2 Danv. 419.
3 D. 183. p. 24.
S. C. Eq. Ab.
182. p. 23.
Fee simple with a double aspect.
Post. 229.
8 Co. 79. a.
Quære, The case of Doe, of the demise of Brown v. Holmes and Longmire in C. B. Mich. 12 Geo. 3. the like case with this, was determined, *viz.* That A. took an estate for life, and that the common recovery barred the remainder over to B. which was held to be a contingent remainder; the first limitation being a contingent remainder in fee to the issue male of A.—Note to the 5th edition. Vi. 2 Bl. 777.

* [225]

(a) R. acc. 8 Mod. 253, 382. Str. 798. Fitzg. 7. 10 Mod. 181. Gilb. L. & E. 20, 129. 3 Wils. 242, 244. Vide 1 Vent. 232. Ray. 28. 1 Sid. 47. 2 Lev. 224. 2 Mod. Ca. 261, 283. 2 Atkyns 570. 3 Atk 784.

(b) Vide Str. 804. Fitzg. 321. 1 Bro. Cb. Ca. 220. 1 Eq. Ca. Ab. 184. 4 T. R. 299. Doe v. Collis. Lord Kenyon said, that this position is to be collected from all the cases there cited, taking them altogether [*int. al.* the present]; that in a will *issue* is a word either of purchase or limitation as will best answer the intention of the devisor; though in the case of a deed it is universally taken as a word of

purchase. Vide 5 T. R. 299. Denn v. Puckey.

(c) Vide ac. 2 Saund. 388. 4 Mod. 224. Skin. 431. Com. 372. 1 T. R. 632. Fearn's 295. Doug. 265. (252.) Cowp. 18. 4 T. R. 764.

(d) Vide Reeve v. Long, post 227.

(e) R. acc. 3 Wils. 237. Vide Doug. 265. (251.) 504. Notes to Doe and Fonereau, 3 T. R. 488. 4 T. R. 39.

(f) Vide 3 Atk. 774. 4 T. R. 82. Fearn's Cont. Rem. 161. Amb. 204. Fearn, 4th edit. 349.

(g) Vj. acc. 3 Wils. 225, 237, 241. 2 Bl. 777. Doug. 264. (251.) 753. (725.) 4 T. R. 82. 5 T. R. 299. Fearn 282. (520.)

3 Lev. 22, 264.
1 Lev. 11, 25,
235. 1 Sid. 47.
Ray. 30. 1 Keb.
29, 119. 1 Mod.
214.

Nota: In the report of this case in 3 *Lev.* 431. it is said, that the Court were agreed to give judgment for the avowant upon the point, that *A.* only took an estate for life, when *Powell, J.* started the other point, whether the devise over to *B.* was only a contingent remainder, or an executory devise: Upon which it was afterwards twice argued; but that, before any judgment given, the parties agreed and divided the estate (*a*).

But it appears by a *MS.* of Judge *Blencowe*, that after long consideration judgment was given that *A.* had only an estate for life.—Note to the fifth edition.

(*a*) The case of *Carter v. Barnardiston*, 1 *P. Wms.* 504. was a continuation of the same dispute. The decision, as reported above, was confirmed by the

House of Lords on an appeal concerning the same devise in *Carter v. Barnardiston*, 2 *Brs. P. C.* 1. *Vi. Str.* 804. *Fitzg.* 21.

2. Milford *versus* Smith.

[*Mich.* 5 *W. & M. B. R.*]

Granted, in a will, construed as if it had been agreed to be granted. 1 *Show.* 350. *S. C.* 4 *Mod.* 131. *Comb.* 195. 3 *D.* 200. p. 7.

Vide 1 *And.* 188. 1 *Ves.* 437. 2 *Bl. Rep.* 930. 7 *Bro. Par. Ca.* 353.

UPON a special verdict in ejectment the case was, *A.* being seised in fee, by indenture, &c. in consideration of marriage, covenanted to levy a fine to certain uses, and no fine was levied. *A.* reciting this deed by his will devises and confirms *all estates given and granted* to his son in marriage according to the deed. And it was resolved *per Cur.* that the will had reference to the deed, and passed such lands and such estates as were intended to be conveyed by the deed and fine: for the word *grant* in a will is not to be taken strictly but largely for any agreement. *Vide Cro. El.* 68. 2 *Cro.* 148.

3. Lamb *versus* Archer.

[5 *W. & M. B. R.*]

Limitation of a term to *A.* and the heirs of his body, and if he die without issue, living *B.* then to *B.* is good. *Palm.* 48, 333. 2 *Roll. Rep.* 129. *Vide D. Norfolk's case*, in *Select Cases* in Chancery. 2 *Cro.* 459. *W. Jones* 15. *Sid.* 37. *Eq. Ab.* 192. pl. 8. *S. C.* *Comb.* 208. *Carth.* 266. *Skin.* 340. *Holt* 227. *Cases B. R.* 44.

IN *ejectment* a special verdict was found, and the case, as shortly put by the Court, was this; *H.* possessed of a term for years devises his land to *A.* and to the heirs of his body; and if *A.* die without issue, living *B.*, then to *B.* *Northey*, who argued the case, said, that the judges would allow a limitation in remainder not only to a person *in esse*, but to the first son of the person *in esse*. *Vide* 1 *Sid.* 451. 1 *Cro.* 230. 1 *Ro.* 612. And the Court held this was a good limitation to *B.*, the contingency arising within the compass of a life; and they denied *Child* and *Bayly's case*, 2 *Cro.* 460. *Mr. Gould*, in arguing the case, said, if one make a feoffment to the right heirs of *B.*, that this was a good springing use: *Sed tot. Cur. contra eum in hoc*, because it is by way of present limitation; *aliter* where it is future, as to the right heirs of *B.* after his death (*a*).

(*a*) *R. acc.* 1 *Eq. Ca. Ab.* 193.

4. Goodright *versus* Cornish.

[Hill. 5 W. & M. B. R. 1 Ld. Raym. 3. S. C.]

IN *ejusment* a special verdict was found, *viz.* *Knowling* had issue two sons, *John* and *Richard*, and devised lands to *John* for 50 years, if he should so long live, and as for my inheritance after the said term, I devise the same to the heirs males of the body of *John*, and for default of such issue, then to *Richard*. The Court resolved, 1st, That *John* had not an estate-tail by implication upon the words *without issue*, because the deviser had given him an estate for years by express words, and the Court cannot make such a construction against express words, when thereby they would also drown the estate for years, and make an estate of inheritance (a). 2dly, The Court held this devise to the heirs males of the body of *John* to be void in its creation (b): For, for want of an estate of freehold to support it, it was void as a remainder; and they seemed not to think it an executory devise, because it was limited as a remainder, and because it is limited *per verba de presenti* (c). If one devise his estate to the heir of *J. S.*, and *J. S.* is living, the devise shall not be construed an executory devise, and such a devise is therefore void; but if it were to the heir of *J. S.*, after the death of *J. S.*, that is good, as an executory devise: So note the diversity *inter verba de presenti & verba de futuro* (d). 3dly, The Court held the limitation to the heirs males of *John* was become void by event, whatever it was in its creation, because *John* is now dead without issue. 4thly, The Court held, that if the remainder to the heirs males of *John* was void in point of limitation, then the next remainder limited to *Richard* took effect presently. 4 *Mod.* 255. S. C.

4 *Mod.* 255.
Post 236, 238.
Devise to A. for 50 years, if he so long live, remainder to the heirs male of A., remainder to B., the last remainder takes effect presently. No implication to be received against express words.
Post 229. *Moor* 359. pl. 491.
Palm. 376. *Cra.* Car. 185. Limitation per verba de presenti will not make an executory devise, but verba de futuro will.
3 *Lev.* 408.
3 *Cro.* 158.
2 *Inst.* 22. b.
1 *Mod.* 159.
160. *Dyer* 124. pl. 38, 122. pl. 20. *Cro.* EL. 423, 525, 526.
3 *Lev.* 373.
Comb. 256.
3 *D.* 237. p. 4.
S. C. *Comb.* 254. *Holt* 227. *Cases B. R.* 52. *Skinner* 408.
1 *Eq. Ab.* 189.

2 *Dan.* 519. pl. 13.

(a) *R. acc.* 1 *Wils.* 225. *Bur.* 2157.
Bl. 643. *Vide* 1 *Bl.* 606.

(c) *Vide* 2 *Wms.* 28. 1 *Blac.* 643.

(b) *Vi.* 4 *Bur.* 2162. *Fearne, C. R.* 207.

(d) *Vide* some observations on this doctrine in *Fearne's Cont. Rem.* 426. *Powell on Devises*, 329.

5. Blisset *versus* Cranwell & al.

[Pas. 6 W. & M. C. B. S. C. cited in 1 Ld. Raym. 624.]

IN *ejusment* upon trial at *West* assizes, a case was made for the opinion of the Court, *viz.* A. being seised of the lands in question devised in these words, *I give and devise*

Devise to A. and B. and their heirs, and the longer liver of

them, equally to be divided between them and their heirs, makes a tenancy in common.

Show. 373.

3 Mod. 209.

2 Vent. 56.

1 Vent. 223.

376. 2 Sid. 53.

Pollexfen 408.

424. 3 Lev.

373. S. C.

Comb. 256.

1 Willson 341.

* [227]

3 Chanc. Caf.

64, 65.

2 Ro. Ab. 90.

Gouldf. 88.

3 Leon. 19, 25.

26. 2 Sid. 53.

Cro. El. 443.

695, 696.

1 Leon. 113.

1 Bulst. 113.

Mo. 594, 667.

3 Co. 39. b.

Dyer 25 pl. 158.

Br. Devise 29.

Godb. 362, &c.

2 Sid. 78, 79.

Cro. Car. 75.

Ante, pl. 4.

2 Vent. 366.

3 Vent. 216.

No construction to be received against express words. 1 Cro. 75. Ben. 18, 19.

to my two sons and their heirs, and the longer liver of them; equally to be divided between them and their heirs, after the death of my wife, all that my messuage, &c. The devisor dies, his wife dies, one of the sons entered and made his will, and devised his part to the lessor of the plaintiff, and died, and the defendant was the surviving devisee of A.; and therefore it was agreed, that if the two sons were joint-tenants, then this devise was void *quoad* the survivor; but if by the first will the two sons were tenants in common, then this devise to the * lessor was good. And after argument, the Chief Justice, *Nevill* and *Rekefby*, were of opinion, that they were tenants in common, and that the devise was good, and the reason was upon the construction of wills, that it ought to be according to the intent of the devisor; his intent appearing by the words to be not only to provide for his two sons, but for their posterity, that not only his two sons, but their heirs, should have an equal part; for the words are, *equally to be divided between them and their heirs*; and though by the first words it is given to them and the survivor of them, yet the last words explain what he intended by the word *survivor*, and that the survivor should have an equal division with the heirs of him that should die first; and though the testator has not aptly expressed himself, yet, upon all the words taken together, his meaning seems to be so. That the cases in *Sty.* 211. and 2 *Ro.* 90., differ from this case, as the C. J. said, for there the inheritance is fixed and settled in the survivor, which shews plainly his intent that they should be joint-tenants: But here the inheritance is appointed to be *equally divided betwixt them and their heirs*, and here the words *equally to be divided*, do immediately follow the word *survivor*, which shews he intended a division in case of survivorship; but in the other case it is otherwise: The cases upon which they grounded themselves were, 3 *Cro.* 443. 2 *And.* 17. *Sty.* 434. *Powell, J. contra*, That the exposition of a will may be enlarged to so great an uncertainty, that it is fit to put a stop to it, and that it is the words of the will only that are to explain the testator's intent. That the word *survivor* makes a joint-tenancy by express words; but the words *equally*, or *equally to be divided*, were taken at first only to import a future division to be made, but afterwards it was agreed, that these words also made a tenancy in common: but this was only an exposition collected out of the words where there was no joint-tenancy given by express words. No construction of an intent shall be received against such express words, for this would be to confound the text: And he relied upon the case in 2 *Ro.* 90. *Sty.* 211., and concluded for the defendant, that the two sons were joint-tenants; but by the opinion

opinion of the three other justices it was adjudged that they were tenants in common (a). Judgment *pro quer.* (b)

(a) *R.* 1 *Ld. Raym.* 721. 1 *Atk.* 493, 494. that the words *equally to be divided between them*, *Prec. in Cb.* 491. that *equally amongst them*, *Cowp.* 657. that *equally*, 1 *Pez.* 165. that *to be equally divided amongst them*, and the *survivor of them*, and *their heirs for ever*, make a tenancy in common in a will. *Vide* 3 *Bur.* 1831. 2 *Br. Ch.* 233. 1 *Atk.* 493. 2 *Wms.* 280. (b) A devise to *B.* and *C.* and the survivor of them, and their heirs, equally to be divided between them, creates a joint-tenancy for life, with several inheritances, *Barker v. Giles*, 2 *Wms.* 280. 3 *Bro. P. C.* 297.

6. Reeve *versus* Long.

[Pasch. 6 W. & M. B. R.]

ERROR of a judgment in *C. B.* in ejectment, where- in a special verdict was found, and the case was, *John Long* being seised in fee devised the lands to his nephew *Henry Long* for life, remainder to the first son in tail male, and so on to the second, third, &c. And for default of such issue, remainder to his nephew *Richard Long*, lessor of the plaintiff, for life, remainder to the first son in tail, and so on to the second, third, &c. with divers remainders over. The devisor died, *Henry* married, and died without issue, leaving his wife enfeint with a son; *Richard* entered as in his remainder, and afterwards the posthumous son (the defendant) was born, and his guardian entered upon the lessor; whereupon he brought this ejectment; and judgment was given for the plaintiff in *C. B.* by the whole Court: And now that judgment was affirmed by this Court; and resolved, 1st, That the remainder to the first son of *A.* is a contingent remainder, and must take effect during the particular estate of *A.*, or *eo instante* that it determines; that by consequence this remainder to the son became void by the death of the tenant for life before *A.* had a first son. 2dly, That this was such a default of issue, or a dying without issue, that instantly the remainder limited over to *B.* vested in him, and he became seised in possession; and this cannot be defeated nor the estate fetched back again, though *A.* has a son born afterwards.

But *note*; This judgment was afterwards reversed in the House of Lords against the opinion of all the judges, who were much dissatisfied with the reversal, and blamed the judge who tried the cause for suffering a special verdict to be found. *Vide stat.* 10 & 11 *W.* 3. c. 16. But *querre*, whether that extends to a devise? for the words are, *where an estate is by any marriage or other settlement limited*, &c. (c)

(c) I do not find that there has been any absolute decision whether this statute is applicable to wills; but in *Roe v. Quartley*, 1 *T. R.* 634. the Court seems

Carth. 509, S.C.
3 *Lev.* 408.
4 *Mod.* 282.
S. C. *Skin.* 430.
Comb. 252.
Cases B. R. 53.
Holt 228, 286.

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Plowd. 33. a.

Contingent remainder must vest during the particular estate, or *eo instante* that it determines. *Pollex.* 199. 1 *Inst.* 298. *Cro. El.* 878. *Noy* 43. 1 *Co.* 66. 2 *Jo.* 111. 1 *Lev.* 12. 2 *Danv.* 520. 3 *Lev.* 341, 434. 1 *Sid.* 47. *Ray.* 162. 2 *Saund.* 380. *Comb.* 375. 5 *Mod* 63, 101. 1 *Saund.* 186.

seems to take it for granted that it is. Mr. Butler, in a note to *Co. Lit.* pa. 298. says, "There is a tradition that, as the case of *Reeve* and *Long* arose upon a will, the Lords considered the law to be settled by their determination in that case, and were unwilling to make any *express mention* of limitations or devises made in *wills*, lest it should appear to call in question the

authority or propriety of their determination. Besides, (he observes,) the words of the act may be construed; without much violence, to comprize settlements of estates made by will, as well as settlements of estates made by deed." In *Bull. N. P.* pa. 105. it is also said that there is no ground for the distinction.

7. South *versus* Alleine.

[Trin. 7 W. & M. B. R.]

5 Mod. 63, 98, 101. Devise of the rents and profits to A. to be paid by the executors, is a devise of the lands to A. 3 D. 200. p. 8. S. C. Comb. 375. Eq. Ab. 383. p. 2. post 679. 3 Bro. Par. Ca. 458. 2 Ld. Ray. 873. 1 Bro. Cha. Ca. 75. 2 T. R. 44. 1 Ves. 133, 154. 1 Saund. 186. Cro. El. 190. Co. Lit. 4. b. Cro. Jac. 104. pl. 39. Moor 635, pl. 871. 753. pl. 1040. 3 Leon. 9. All. 45.

IN *ejectment* upon a special verdict the case was, that *J. S.* being seised of lands in fee, 29 *Car.* 2. devised all the rents and profits of such lands to *Sarah Birch*, wife of *William Birch*, during her natural life, to be paid by his executors into her own hands, without the intermeddling of her husband; and after her decease, he devised them unto and amongst *J. B.*, *M. B.*, and *R. B.*, &c. The question was, Whether by this devise *S. B.* had the lands themselves? And Mr. *Northey* argued she had; for by the words, *rents and profits*, the land itself would pass, which the Court granted; then the question was, Whether these last words, *to be paid by his executors*, &c., did not alter and restrain the first words? And he argued, they did not, for which he cited *Vel. 73. Carpenter and Collins*, 3 *Cro.* 674, 724. *Pigott versus Garnish*, 1 *Cro.* 368. *Spirit versus Bence*, 2 *Leon.* 221. pl. 208., and 3 *Leon.* 78. But *per Holt*, C. J. I am not satisfied with it: And he seemed strongly to incline that the executors were trustees for the wife; but the defendant had judgment by the opinion of *Rokeby* and *Eyre* against *Holt*, C. J.

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8. Scatterwood *versus* Edge (a).

[Trin. 9 Will. 3. C. B. Rot. 1424.]

Devise to the first son of A. (A. having none at that time) is void. Eq. Ab. 289. p. 15. S. C. Cases B. R. 278.

IN *ejectment* a special verdict was found, viz. *Robert Edge* devised to trustees for eleven years, and then to the first son of *A.* and the heirs males of his body, and so on to the second, third, &c. sons in tail male, *provided they the said sons shall take on them my surname; and in case they or their heirs refuse to take my surname, or die without issue, then I devise my land to the first son of B. in tail male, provided*

(a) Ld. Chancellor *Thurlow*, 3 *Bro. Ch.* 398. said, This case was so ill re-

ported, that it was not very easy to discover what points were determined.

be

he take my surname; and if he refuse, or die without issue, then to the right heirs of the devisor. *A.* had no son at the time of the devise, and died without issue; and *B.* had a son who was living at the time of the devise, who took the surname of the devisor. The whole Court agreed, 1st, That the devise to the first son of *A.* was not a contingent remainder, but by way of executory devise, because the precedent estate is for years, which cannot support a remainder; for a contingent remainder can never depend on a term of years, because of the abeyance of the freehold (a); nor can it be limited after a fee, because after such a disposal nothing remains in the owner to limit (b). *Et per Powell*, A devise to the first son of *A.* having none at that time, is void (c) because it is by way of a present devise, and the devisee is not *in esse*; but a devise to the first son of *A.* when he shall have one, is good, for that is only a future devise, and no inconvenience, for the inheritance descends in the mean time. 2dly, They held that an executory estate, to rise within the compass of a reasonable time, is good; that 20, nay 30 years, has been thought a reasonable time. So is the compass of a life or lives; for let the lives be never so many, there must be a survivor, and so it is but the length of that life; [for *Twisden* used to say, the candles were all lighted at once,] but they were not for going one step farther, because these limitations make estates unalienable, every executory devise being a perpetuity as far as it goes, that is to say, an estate unalienable, though all mankind join in the conveyance. And as to the principal case, *Blencow*, J. held the devise to the first son of *A.* to be future; for he supposed the testator knew *A.* had no son, and that the rather, because he does not name him. *Powell*, J. There are three sorts of executory estates, one where the devisor parts with his whole fee-simple, but upon some contingency qualifies that disposition, and limits another fee upon that contingency, which is altogether new in law, as appears by 1 *Inff.* 18. A fee cannot be limited upon a fee (d). *Vide* 1 *Ro.* 825, 826. 1 *Cro. Pells* and *Brown*. The second sort is, where he gives a future estate to arise upon a contingency, and does not part with the fee at present, but retains it; these are not against law; for by common law one might devise that his executor should sell his land, and in such case the vendee is in by the will, and the fee descends to the heir in the mean time: For this sort *vide* 2 *Leon.* 11. 3 *Leon.* 64. *Cro.* 3 *Leon.* 64, 70. *El.* 853. *Mo.* 644. 2 *Ro.* 793. *Raym.* 82. A third sort

Cro. Jac. 592.
Co. Lit. 18. a.

Vide Goodright
v. Cornish,
Ante 226.

Within what
time an execu-
tory estate ought
to arise. *Carter*
53. 2 *Kelynge*
204. 2 *Wil-*
liams 28.

Three kinds of
executory estates.
Ante 224. *Poph.*
34, 35. 2 *Cro.*
591. 1 *Roll.*
Rep. 318. *Cro.*
Jac. 394.
1 *Roll. Abr.*
612. pl. 5.
Tho. Raym. 82.

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(a) *Vide acc.* 1 *Atk.* 422.

1 *Willf.* 225. 4 *Bur.* 2157. 3 *T. R.* 86.

(b) *Vide acc.* *Fearne's Contingent Re-*
mainders, 2d edit. pa. 206.

(d) *Vide F. C. R.* 292.

(c) *Vide Ca. Temp. Talb.* 145, 150.

2 Roll. Rep. 335. 1 Roll. Rep. 137. Moor 177. pl. 312, 228, pl. 358. Devise to infant in ventre *sa mere*, good, by way of executory devise. 1 Lev. 135. 2 Mod. 9. Dyer 303. pl. 50. Raym 163, 164. 1 Keb. 851. 1 Roll. Rep. 190.

Devise to the first son of A. if he takes my name, if not to B., A. dies without issue B. shall take; for the refusal of A.'s son is not a condition precedent. Ventris 199. Moor 637. pl. 877. 1 Roll. Rep. 254. 2 Bulst. 275.

of executory devises is of terms, which are well settled in *Matth. Manning's* case: It is dangerous to extend the boundary of these executory devises, which at present is a life or lives. A devise to an infant in *ventre sa mere*, by the better opinions, though various, is not good. *Vide* 11 H. 6. 13. *Bro. Devise* 32. 1 Ro. 609, 610. *Dyer* 303, 304, 342. *Mo.* 127, 177, 634. 2 *Bulst.* 272. 1 *Ro. Rep.* 110. *Litt.* 255. But I am of opinion it is good (a); for he, taking notice that the devisee is *in ventre*, must intend a future devise; but a devise to A.'s first son does not import notice in the devisor that A. has no son: It may as well be said a devise to the heirs of J. S., a person living, is good, because the testator knew he was alive, and therefore meant a future devise (b) The question here is, Whether the precedent term for eleven years makes a difference? I hold not, because it is an original devise *per verba de presenti*, and so differs from 1 *Raym.* 12. 2 *Mod.* 292. But had it been to the first son to be begotten, it had been otherwise. Lastly, He held that the devise to the first son of B., who was born and *in esse* at the time, was good; and as to the objection, that the devise to the first son of A. was a condition precedent, and so that failing, all fails, (*Vide* 1 *Inf.* 218.) he held, it was not a precedent condition, but part of the limitation. *Treby*, C. J. If the devise to the first son of A. be good, then the devise to the first son of B. is not good; but if that to the first son of A. be bad, then this to the first son of B. is good. Had the first son of A. been before the Court, the judgment must have been against him, because as a remainder it was void, and as an executory devise it was void; for these are either present or future: If present, the party must be *in esse & capax* at the time, or all is void; like a devise to the right heirs of J. S. who is living; this is a present devise, and therefore not like the case of an infant *in ventre sa mere*: Where future, they must arise within the compass of a life; no longer time has yet been allowed: And he was not for prolonging the time in favour of these inconvenient estates (c). 2dly, He held the devise to the first son of A. was not a precedent condition, but a precedent estate attended with

(a) At this day it is clearly agreed, that a devise to an infant *in ventre sa mere* is good, though he be born after the testator's death, and he shall take by way of executory devise. *F. C. R.* 429. *Freem.* 244, 293.

(b) *Vide* 4 *Bar.* 2162.

(c) The law appears to be now settled, that an executory devise which must, in the nature of the limitation,

vest within twenty-one years after the period of a life in being, is good; and this appears to be the largest period yet allowed for the vesting of such estates. *F. C. R.* 321. Perhaps the period may be extended by the time between the death of a parent and the birth of a posthumous child. *Vide Herg. Co. Lit.*

these

these limitations (a). Judgment was given for the defendant, and afterwards affirmed in *B. R.* (b)

(a) *R. acc. Jones v. Westcomb*, 1 *Eq. Ca. Ab.* 245. *Prec. Ch.* 316. *Gilb. Eq.* 74. *Andrews v. Fulham*, 2 *Eq. Ca. Ab.* 294. *Gulliver v. Wickett*, 1 *Wilf.* 105. *Avelyn v. Ward*, 1 *Vex.* 420. *Statbam v. Bell*, *Cowp.* 40. *Fonereau v. Fonereau*, 3 *Atk.* 315. *Bradford v. Foley and others*, *Doug.* 63. *Vide Fearne* 360. (163), (400.) The principle of these cases is thus stated by *Ld. Chancellor Turlow*, in *Doe v. Brabant*, 3 *Bro.* 393. "Wherever the prior estate is made to depend upon any described event, and the second estate is to arise upon the determination of that event, the first is not to be taken as a condition precedent, but upon its failure the second estate must take place." (b) As to the general doctrine in this case, *vide Doe v. Fonereau*, and the Reporter's Notes, *Doug.* 504, (470.)

9. Eyres *versus* Faulkland.

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[*Hill.* 9 *Will.* 3. *C. B.* 1 *Ld. Raym.* 325. *S. C.*]

H Possessed of a term for ninety-nine years devised his term to *A.* for life, and so on to *B.* and five others successively for life; all seven being now dead, the question was, Who should have the residue of the term? *Et per Treby and Powell*: Anciently, if one having a term devised it to *A.* for life, remainder to *B.*, such remainder was void; 1st, Because an estate for life is a greater estate; and, 2dly, Because the term included the whole interest, so that when he devised his term, nothing remained to limit over. Afterwards the law altered; for a devise of the term to *B.*, after the death of *A.*, was held good; and by the same reason to *A.* for life, remainder to *B.*, for it was but disposing of the interest in the mean time; but a devise to *A.* in tail, remainder over, is too remote; so if it be to *A.*, and if he die without issue, remainder over. As to the principal case, they held that all the remainders were good; and that the first devisee, and so every devisee in his turn, had the whole term vested in him; during which the next man in remainder, and so every other after him, had not an actual remainder, but a possibility of remainder, and the executor of the deviser a possibility of reverter; for there may be a possibility of reverter, even where no remainder can be limited, as in the case of a gift to *A.* and his heirs while such a tree stands: No remainder can be limited over, and yet clearly the donor has a possibility of reverter, though no actual reversion; *a fortiori*, there shall be a possibility of reverter, where a remainder may be limited over; for the testator gave but a limited estate, and what he has not given away must remain in him; and the

Devise of a term of years to several successively for life. After all are dead, executor of deviser shall have the residue. 2 *Dan.* Ab. 518. pl. 5
1 *Roll. Abr.* 611. L. 1.

1 *Sid.* 450.
2 *Sid.* 135, 155.
Fearne 304.

There may be a possibility of reverter, where no remainder can be limited. 2 *Salk.* 567, 576, 590.
1 *Saund.* 260.
3 *Lev.* 94. *Holt* 163. *Lit.* 348.

words *for life* can be no more rejected in the last limitation than in the first (a).

(a) *Vide Ca. Temp. Ld. Talb.* 41. 1 P. W. 666. *Fearne's Cont. Rem.* 375.

10. Bertie *versus* Falkland.

[Hill 9 Will. 3. In Canc. 2 Vernon 340. S. C. Powell on Devises, 247, 480. S. C. cited.]

Select Cases in Chancery, 129. S. C. Where a condition is precedent to the taking of an estate, Chancery cannot relieve in case of non-performance; otherwise in case of forfeiture.

2 Vern. 333. Eq. Ab. 110. p. 10. Cases B. R. 182. Holt 235. Vide 3 Wms. 65. 4 Bro. P. C. 194. 1 Atk. 361, 381, 500. Com. 726. 3 Atk. 504.

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† Ld. Chancellor, with assistance of two judges, viz. Treby and Holt: No papers, letters, &c. can be taken notice of to influence the construction of a will Post 235. 3 Ch. Rep. 94. 98. 1 Ves. 231. Doug. 31. Bull. N. P. 297.

2 Lev. 70.

CARY by will, dated the 10th of September 1685, devised to trustees and their heirs, upon trust to take the profits for three years, and if within the three years there happened a marriage between the Lord *Guilford* and Mrs. *W.*, who was then ten years of age, and his heir at law, then to Mrs. *W.* for life, remainder to her first son, &c. And if the marriage did not happen, then the remainder to Lord *Falkland* in tail; they differed about the terms, so the Lord *Guilford* took another lady, and Mrs. *W.* was married to C., who brought a bill to have the estate, as being a person equivalent, that is to say, equal in estate, family, and person (as they urged) to the Lord * *Guilford*; and the lady an infant, and in no fault, she having done what she could, and therefore she ought not to forfeit for the fault of another, and they produced evidence from papers, letters, and sayings of the testator, to prove his intent in this will was not that it should be in Lord *Guilford's* power to make her forfeit. *Et per Cur.* † These collateral papers, &c. cannot be taken notice of to influence the construction of this will, for that would be to let them in, and to make them part of the will itself; and by the statute of frauds and perjuries, every part of a will must be in writing: But before that statute, where a will was in writing, no collateral proofs by papers or words could be admitted, because a will was a complete and consummate act of itself; that therefore they must construe it by itself. That Chancery could not relieve in this case, though the condition was answered to what the lady was capable of doing, for that the condition was precedent; and though Chancery relieves non-performance, it is only upon a forfeiture, for which equity can have a valuation made, and give a compensation. Decreed for the Lord *Falkland*, but reversed on appeal to the House of Lords.

11. Badger *versus* Lloyd.

[Trin. 9 Will. 3. B. R. Rotulo 373. 1 Ld. Raym. 523. S. C.
Comyns 62. S. C.]

IN *ejectment* a special verdict was found, *viz.* *John Lloyd* the elder conveyed lands by lease and release to the use of himself for ninety-nine years, if he lived so long, remainder to his son *John* for ninety-nine years, if he lived so long, remainder to *Elizabeth* the son's wife for life, remainder to trustees to support contingent remainders, remainder to the first, second, third, &c. sons of *John* the son in tail-male, remainder to *John* the father in tail, remainder to him and his heirs. *John* the elder had issue the said *John*, *Thomas*, *Paul*, and *Peter*, and after makes his will, whereby, reciting this settlement, he devises these very lands, after *John* the son's death without issue-male, to *Thomas*, and after the death of *Thomas* without issue-male, then to *Paul*, and if *Paul* die without issue-male, none of his other brothers being living, then to *Peter* and his heirs for ever. *John* the elder died, and *John* the son suffered a common recovery; and the lessor of the plaintiff, who claimed by the devise and the recovery also, was the only son of *Peter*, and the defendant was a purchaser under a fine from *Thomas*. The title depended upon these three points; 1st, Whether the remainder devised to *Peter* was contingent? 2dly, Whether it was an immediate estate vested, or executory? 3dly, Whether the intails there devised were not vain and fruitless, such as never could take effect, and therefore void?

Ante 224.
Raym. 28.
1 Sid. 47. Far.
69.

1 Lev. 11.
4 Mod. 282.
3 Lev. 341.

The first question arose from the words, *and none of his brothers living*: And the Court held that these words did not alter the case, because they say nothing but what was implied and understood before: The sense had been the same if they had been omitted, and then this had been like all other limitations of remainders; and it is plain, the limitation to *Peter* can never take effect till all are dead. To construe it otherwise would be to destroy all the express estates before devised. *Vide* 1 Cro. 185. 2 Cro. 415. (a)

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Expressio eorum
quæ tacite insunt
nihil operatur.

The second question arose from this objection, That *John* the father having an estate-tail in remainder, with a reversion in fee expectant, this devise of his cannot take effect till the old estate-tail be spent: So this devise, if ever it take effect, is to commence after a dying without issue, which is a void executory devise: The Court agreed, that

Devise to A. B.
a stranger, dying
without issue,
executory;

(a) *Vide* Bur. 228. Fearn 167.

othérwise, if B. were tenant in tail, remainder to the devisor.

if a man seised in fee does devise his lands to A. and his heirs, if J. S. a stranger die without issue, this is an executory devise; because there is no precedent particular estate: *Aliter* if J. S. had been tenant in tail of the lands, the reversion to the devisor, as in this case; for here is an immediate devise of a present reversion, and the words, *after*, or *from and after*, are only to denote when they are to take effect in possession. 10 Co. 107. 3 Cro. 323. 1 Saund. 151. (a)

A. having remainder in tail with reversion in fee, devises to one son in tail, remainder to the other in fee; good, because it alters the tenure.

To the third point, *Holt*, C. J. agreed, that the estate-tail devised to *John, Thomas, and Paul*, could never take effect; because the estate-tail, which was in the devisor, must descend to them, and would always interpose and keep back the estate-tail devised, which being no larger, must spend *aquis passibus* with the old intail, and therefore it can never have effect; upon which reason he agreed, that such a devise of a remainder would be void, but he held it otherwise of a reversion, which is also in this case; because there is a feignory and a tenancy created; for tenant in tail must hold of him in reversion, and he of the supreme lord; so that this devise has a real effect as to the tenure, which is altered hereby; *vide* 2 Co. 51.; and so there is a found diversity.

N. The judgment of the Court was, that it was a remainder vested in *Peter*; and this judgment was affirmed, upon error, both in the Exchequer Chamber and House of Lords. Judge *Blencowe's* MS. 1 vol. 139. 1 *Ld. Raym.* 527.

(a) *Vide* Ca. Temp. Ld. Talb. 262. *Fearne* 327.

12. Nottingham *versus* Jennings.

[Trin. 12 W. 3. B. R. 1 *Ld. Raym.* 568. S. C. *Comyns* 82. S; C.]

Devise by father to son and his heirs for ever, and for want of such heirs, then to the right heirs of the father in tail. 1 Will. Rep. 23. S. C.

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Cro. Car. 57, 58. Post 238. Cro. Jac. 416. Vaugh. 269, 270.

I N *ejedment* a case was made upon trial, which was, *H.* had three sons, *A. B.* and *C.*, and devised his lands to *B.* his second son, after the death of his wife, to hold to him and his heirs for ever; and for want of such heirs, then to his own right heirs. *H.* died, and *B.* entered and died without issue, living the eldest son. *Et per Cur.* The second son had only an estate-tail, and the eldest shall take by descent, and not by the will; and so the devise over is void in point of limitation; for his intent was, that the land should descend from himself, and not from his son *B.* If the devise over had been to a stranger, it had been void, and *B.* had taken a fee; but here is only an estate-tail, and the word *heirs* can import nothing more than issue, for *B.* could not die without heirs, living heirs of the father (b).

(b) *Vide* 3 *Lev.* 70. Ca. Temp. Ab. 305. pl. 2. 1 *Vex.* 89. *Ambler* Talb. 1. 2 *Wms.* 370. *Doug.* 254. 3 *Term Rep.* 488, 491. 5 *T. R. Cowp.* 234. 3 *Alk.* 617. 2 *Eq. Ca.* 299.

13. *Cole versus Rawlinson.*

[Hill. 1 Ann. B. R. 2 Ld. Raym. 831. 1702. S. C. Holt
744.]

IN *ejectment* a special verdict was found, viz. That *Billingley* being seised in fee of the Bell-tavern, made a settlement to the use of himself for life, remainder to his wife for life, remainder to his son in tail, remainder to his wife in fee; or to the like effect. The husband died; and the wife being so seised of the said Bell-tavern, and possessed of other leasehold estates, made her will, and thereby devised in this manner, *I give, ratify, and confirm all my estate, right, title, and interest, which I now have, and all the term and terms of years which I now have or may have in my power to dispose of after my death, in whatever I hold by lease from Sir John Freeman, and also the house called the Bell-tavern, to John Billingsley.* This *John Billingsley* was the son and heir of him that made the settlement, and also had the remainder in tail in the Bell-tavern, but was not the heir of the wife: The question was, What estate the said *John Billingsley* took in the Bell-tavern by this devise? *Powell, Powys, and Gould*, Justices, held, that he took an estate in fee; 1st, Because it is but one sentence coupled by the words *and also*, and governed by one verb, whereby the preposition *in* is carried unto the *Bell-tavern*, so that it is a devise of all her estate and interest in her leasehold estate, and also in the Bell-tavern. *Vide Dy. 19. 2 Saund. 165.* And the words ought to have this construction since they are capable of it, because this was certainly the intent of the testator, who could not design so vain and useless an estate to the devisee, as an estate for life after an estate-tail; and for this purpose was urged the case in *Moor 873. 1 Atk. 471. Hob. 3. Mo. 52. 1 Ro. 844.* 2dly, Because the words of the will are rather a description of the testator's estate than of his lands; and the preposition *in* *subintelligitur*, and put it into *Latin*, and it is *ac etiam domo vocat, &c.* And suppose a transposition of the words, which is allowable to serve the intent of a will, and then the matter is plain, for then it is *I give my term of years and all the estate, right and title I have in my term, and also in the Bell-tavern (a);* and *Powys* said, it was an honest construction, and brought back the fee of the reversion to the right heir of the husband, who created the reversion. *Holt, C. J. contra,* For the intent of a * testator will not do, unless there be sufficient words in the will to manifest that intent; neither is

I give all my estate, right, title, and interest in, &c. and also the house called, &c. carries a fee in the house,

1 Atk. 471.

* [235]
Per Holt, the intent of testator to be collected from the words

(a) *Vide 2 Bur. 880.*

of the will, not
extrinsic cir-
cumstances.
Ante 232.

7 Co. 23. 2 Sid.
151. Perk 673.
3 Bulst. 129.
Rule, What
words give only
an estate for life,
and what a fee
without heirs.
Vent. 359.
1 Ro. Rep. 249.
Co. Lit. 9. b.

Post 238. Mat-
ter that cannot
appear till found,
when found is
not to be regard-
ed in the expo-
sition of wills.

Ante 232.

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his intent to be collected from the circumstances of his estate and other matters collateral and foreign to the will, but from the words and tenor of the will itself: And if we once travel into the affairs of the testator and leave the will, we shall not know the mind of the testator by his words, but by his circumstances; so that if you go to a lawyer he shall not know how to expound it. Upon the will it is so, but with the matter found in a special verdict it is otherwise; and what if more accidental circumstances be discovered, and be made the matter of another verdict? Men's rights will be very precarious upon such construction. And as for the honesty of the construction, What if the woman paid a good portion, and was a purchaser of this reversion, is it not as honest then to construe it in favour of her heir, as to expound it in favour of the right heir of the husband? But we must not depart from the will to find the meaning of it in things out of it. It is then a certain rule, that to devise lands to *H*, without farther words, will pass but an estate for life, unless there be other words to shew his intent, *as for ever*; or unless he devise for some special purpose which cannot be accomplished without a larger estate: And as this is a sure rule, so it holds good as well where the devise is of a reversion, as where it is of lands in possession, unless he devise it as a reversion, or take notice of a particular estate; for then his intent may appear upon the face of the will itself: But if the words be general, and without regard to the nature of the thing, it is otherwise; for it shall not be construed from the nature of the thing, which is extrinsical, but from the words of the will. Ask a lawyer what passes, he says an estate for life, for he knew not that it was a reversion; and though it be a fruitless estate and will signify nothing, yet that does not appear till it be found, and therefore when found it is not to be regarded. The case in *Mo.* and *Hob.* differs, for there the testator takes notice of a precedent term, and the words are, *his lands of inheritance*, so that the special intent of the testator is apparent from the words of the will. If I give Black-acre to *A.* and his heirs, and also White-acre, the fee-simple of White-acre shall pass, as well as the fee of Black-acre; because it follows the limitation, and comprises it by the words, *and also*; but if I give all my right, title, and interest in my term, and also my house called the Bell, in the grammatical construction it is no more than, *and also I give my house called the Bell*; for the subject matter of *his right, title, and interest* is the term, and the preposition *in* terminates and rests there. So is the case at bar; but say they, turn it into *Latin*, and then it is, I give *jus, titulum, & statum in termino ac etiam domo vocat.* the Bell-tavern. I answer, the preposition *in* may be necessarily understood in *Latin*; but

but not in *English*, and the conjunction is not so far a copulative as to take in the preposition *in*, though it takes in the verb. My brother *Powell* would transpose the words, so it shall be *all the right, title, and interest in the Bell-tavern, and also all the term I have and hold of Sir John Freeman*. But I do not know how we can transpose words that are good sense. If the will was nonsense, then we may transpose to make it bear a meaning; but to displace the words of the will when they are intelligible, is to alter the will and the sense of it. For these reasons, and also because the heir-at-law was to be favoured, he concluded for the plaintiff. He cited 3 *Cro.* 330. *Hob.* 2. 1 *Cro. Wilkinfon* versus *Merrilan* (a).

20th. 222.

Vide 2 *Vez.* 176.
Doug. 759.
 Words in a will that are good sense, are not to be transposed.

(a) The judgment given in this case, according to the opinion of the puisne judges, was affirmed in the House of Lords. 1 *Bro. Ca. Parl.* 108. *Vide* 1 *Vez.* 232. *Rep. T. Talb.* 202. *Bro. Ca. Ch.* 472. 2 *Atk.* 450. *Vide* also *Powell* on *Devise*s, 520., where it is laid down that nothing can by parol

evidence or averment be put upon a will which does not *previously* stand there; but that any light may be thrown upon what stands there by averments of all distinct facts that *stand well with*, and *have their existence independent* of the effect or non-effect of the words of the will. *Vi.* 4 *T. R.* 601.

14. Popham contra Banfield.

[*Hill.* 2 *Ann.* In *Canc.* 1 *Wms.* 54. 2 *Vern.* 450, 546. called *Banfield v. Popham*.]

DEVISE to *A.* for life, remainder to the first son of *A.* in tail-male, and so on to the 10th son in tail-male, and if the said *A.* die without issue-male of his body, the remainder over. Also by a codicil annexed he recited, whereas he had given an estate-tail to *A. &c.* And it was objected, that by the codicil the intent of the deviser appeared, and that by the will *A.* had an estate-tail; for he might have posthumous children, and more than ten sons: *Sed non allocatur*; for where a particular estate is expressly devised, we will not, by any subsequent clause, collect a contrary intent inconsistent with the first by implication: and therefore they construed dying without issue-male, a *dying without such issue-male*. And they said there was a mighty difference between a devise to *A.*, and if he die without issue, then to *B.*, and a devise to *A.* for life, and if he die without issue, then to *B.* Adjudged, *per Wright* Lord Keeper, *Holt* C. J., and *Trevor* C. J. (b)

Where a particular estate is expressly devised, a contrary intent is not to be implied by subsequent words.
An'e 226. *Mod.*
Cases, &c. 260.
 3 *D.* 217. p. 5.
S. C. *Eq. Ab.*
 108. p. 2.
 1 *Vern.* 79, 167, 344. 2 *Vern.* 427, 546. *Fitz.* 26, 27. 3 *Lev.* 414. *Skinn.* 558, 559.
 1 *Vent.* 229, 230. *Moor* 682. p. 939. *Hob.* 30. 259.
 2 *Brownl.* 271.

(b) By the report of this case in *Wms.*, and also by the case of *Allanfon v. Clitberow*, 1 *Vez.* 24., it appears that this report is incorrect, where it

states the devise only to be to the sons so far as the tenth: for it was a devise to all the sons successively; and in *Langley v. Baldwin*, 1 *Eq. Ca. Ab.* 185. which

which is stated more correctly by Lord *Hardwicke*, in the before-mentioned case of *Allanfon v. Clitherow*, where the devise was to the father for life, remainder to the first, and so on to the sixth son; and if the father died without issue, then over; it was held the father took an estate-tail by implication. *Vide Robinson v. Robinson*, 1 *Bar.* 44. (in which the cases upon the subject are collected). *Allanfon v. Clitherow*, above-mentioned. *Leithallier v. Tracy*, 3 *Atk.* 784. *Evans v. Astky*,

3 *Bar.* 1570. *Doe v. Aplyn*, 4 *T. R.* 82. *Hay v. Earl of Coventry*, 3 *T. R.* 83. From all which cases it seems that no general rule is laid down in the construction of words of this kind; but that Courts, both of law and equity, consider the raising estates by implication as depending upon such implication being necessary to effectuate the general manifest intention of the testator. *Vide* 1 *Bro. Ch.* 519. 3 *Bro. P. C.* 528.

15. Countess of Bridgewater *versus* The Duke of Bolton.

[*Hill. 2 Ann. B. R.*]

The words, All my estate, in a will pass both the thing and all the testator's interest therein. *Mod. Cases, &c.* 255. 3 *D.* 175. p. 12. *S. C.* 6 *Mod.* 106. *Eq. Ab.* 177. p. 17. 3 *Salk.* 315. *Holt* 281. 2 *Ld. Raym.* 968.

* [237]

Cro. Car. 447. *Styles* 293. 2 *Rep.* 46. 1 *Saund.* 160. 2 *Saund.* 411. 3 *Mod.* 31. 2 *Vern.* 564.

Carter and Horner, 4 *Mod.* 89.

A Special verdict was found upon a feigned issue, directed out of Chancery, to try whether the late Duke of Bolton did by his will devise certain fee-farm rents to *John Earl of Bridgewater* in fee. The devise was in these words, viz. *I give certain lands to A., and I give to John Earl of B., my son-in-law, 5000 l. and all my mines; all which I give to my said son-in-law, his executors and assigns, together with all my plate and jewels, and all other my estate real and personal, not otherwise disposed of by this my will, for to be given by him to his children as he shall think convenient, I solely trusting to his honour and discretion, that he will give them such provision as will be necessary.* And another clause was, *Whereas I have contracted for the sale of my fee-farm rents, my will is, that if my debts shall not be satisfied out of my other estate, my executors (whereof the earl was one) shall and may sell some part or all of them for payment of them, notwithstanding the rents are not devised by this my last will.* And the question was, Whether his fee-farm rents should pass to the Earl of B., and for what estate? *Et per Holt, C. J.*, who delivered the resolution of the Court, The rents pass by these words (a), *all my real and personal estate*, for the word *estate* is *genus generalissimum*, and includes all things real and personal, and the fee of the rents passes at least the whole estate of the devisor; for *all his estate* is a description of his fee. In pleading a fee-simple you say no more than *seisitus in dominico suo ut de feodo*; and in *formedon* or other action, if a fee-simple be alleged, you say *cujus statum* the demandant has now. In a will the testator is not tied up to form; it is enough that he expresses and signifies his

(a) *R. acc. 2 Mod. Ca.* 78.

meaning

meaning by any words. Before the statute *H. 8.* if one had devised his land by virtue of a custom, the common law accepted his intent without requiring particular words of limitation, as in cases of conveyances at common law; and as it was so in devises before the statute, there is the same reason why it should be so in devises since the statute: And he held, that devising all his estate, and all his estate in such a house, was the same, and that all his estate in the thing passed in either case. *Hob. 177. Moor 480, 880. 2 Vent. 285. Allen 28. (a)*

*Moor 873.
Godb. 207.
Hob. 2. 1 Roll.
Abr. 835.*

(a) The word *estate*, in its natural import, will carry a fee-simple, unless there be other words to restrain or controul it, *Holdfast v. Martin, 1 T. R. 411. Doe v. Woodhouse, 4 T. R. 89. Ridout v. Payne, 1 Vex. 10. 3 Atk. 486. Bailis v. Gale, 2 Vex. 43. Tanner v. Wise, 3 Wms. 294. Temp. Talb. 284. Barry v. Edgeworth, 1 P. Wms. 524. Ibbetson v. Beckwith, Temp. Talb. 157. Macarree v. Tall, Ambler 181. Stiles v. Walford, 2 Bl. Rep. 938. Doe v. Chapman, 1 Hen. Bl. 223.* In several of the above cases the word *estate* was coupled with circumstances of local distinction, which, it is clearly settled, does not make any difference. The word *estates* has the same operation, *Fletcher v. Smiton, 2 T. R. 656.* In *Goodwyn v. Goodwyn, 1 Vex. 226.* the Court was doubtful with respect to a devise of estates in the occupation of particular tenants. In *Frogmorton v. Wright, 3 Wils. 414. 2 Bl. 889. Right v. Sidebotham, Doug. 759. Denn v. Gaskin, Cowp. 657.* introductory words

of an intention to devise all a person's estate, &c. followed by a devise merely descriptive of particular property, were held only to carry an estate for life; but such introductory expressions were allowed to be of considerable weight in favour of the clear intention of the testator. In *Chester v. Painter, 2 Wms. 335* a person devised one-third part of all his estate whatever to his wife, and to his son and his heirs two-thirds; and it was held that the wife only took an estate for life, the testator having used words of inheritance in the devise to the son. In *Ibbetson v. Beckwith, Temp. Talb. 157.* *Ld. Talbot* held that where the devise was of "all the testator's estate to *A.* for life, and to *T. D.* after her death, he taking the testator's name, and if he refused, to *M. B.* and her heirs for ever," *T. D.* had a fee; but the testator's intention to pass a fee appeared manifest from other clauses in the will. *Vide Corp. 306, 352. Bro. Ch. 437.*

16. Bunter *versus* Coke.

[Mich. 6 Ann. B. R.]

H. Devised to his wife all such sums of money, lands, tenements, and estate whatsoever, whereof at the time of his decease he should be possessed. After the making of the will, *H.* purchased lands of the custom-gavel-kind; and the question was, Whether these lands passed by the devise? It was urged, that if a decedent devises, and after re-enters, the devise is good: *Et hoc fuit concessum*, because by the entry he was seized *ab initio*, so as he might bring trespass; so if one have a remainder in fee expectant on an estate for life, and devise it, and tenant for life dies,

By devise of all the lands I shall have at my decease, lands purchased after the devise pass not. *Hoit 248. S. C. Fitzg. 226. 11 Mod. 130. Gilb. Dev. 122. Powell on Devises, 194. 3 Co. 30.*

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the estate in possession passes; and this was granted, because the devisor was seised at the time of the will; and his intent was to pass all. *Sed per Cur.*

1st, A devise of things personal is good, though the testator hath them not at the time of his will, because they go to the executors, and the legacy passes not by the will, but by the assent of the executors, to whom the will is only directory; so that the legatee is in by the executors; but the Court doubted somewhat of a chattel real, as a lease for years, *vide Gouldsb.* 93., that it does not pass (a).

Lut. 736.
See Yelverton v. Yelverton. Cro. El. 401. how far this rule extends to conveyances at common law, and also conveyances by way of use, which have their operation by statute.

2dly, A devise of lands is not good if the testator had nothing in them at the time of the making his will; for a man cannot give that which he has not, and the statute only empowers men *having* lands to devise them, so that if the devisor has not the lands, he is out of the statute; *Co. Lit.* 392., and that which was void in its original can never become good. If an infant makes a will, it is void, though he come of full age before he die; but a republication after full age passes the land; so of a feme covert; and in these cases there was only a personal disability, *viz.* infancy and coverture; so here there is a real disability by wanting the thing; and the constant form of pleading is, that the testator was seised, and being so seised, made his will. *Co. Ent.* 364. *Raf.* 274. And there is no difference between a devise of lands, stock and gavel-kind, by custom. 34 *H. 6. F. N. Br.* 199. Upon which place *note*, that they must be *sua* at the time of the devise.

1 Sid. 162.
Plowd. 343.
3 Co. 30.

3dly, Had there been a republication, it was admitted these lands would have passed; for a republication is as making a new will, and the intent is manifest (b).

Carter 2. Show. 91.

4thly, It was admitted, that if one devise to two and their heirs, and one dies *in vita testatoris*, the survivor has all (c): And that if one has a manor and devises it, and after a tenancy ofcheat (d), that shall pass by the devise as being part of the manor.

Note; This judgment was affirmed in *Dom. Proc.* 1 Bro. P. C. 202.

(a) It has been determined, in *Stirling v. Lydiard*, 3 Atk. 199. *Carte v. Carte*, Ambler 28. that a leasehold estate for years, or the trust thereof, pass under a will made prior to the estate being demised. The same opinion was held *per Curiam* in *Marwood v. Turner*, 1 P. Wms. 163. *Abney v. Miller*, 2 Atk. 609. and the point seems to be universally admitted; but in deciding upon the construction of such will, a devise of a leasehold estate is held to be adeemed by surrendering and renewing the lease, unless the con-

trary is expressed. *Abney v. Miller*, *ubi sup.* *Rudston v. Anderson*, 2 Vex. 418. *Hens v. Medcraft*, 1 Bro. Ch. 261. Copyhold lands purchased after making the will do not pass, *Harris v. Cusler*, 1 T. R. 438. n.

(b) *Vide Doe v. Kest*, 4 T. R. 604.

(c) where a devise is to several, as tenants in common, and one dies in the life-time of the testator, the devise to him becomes lapsed. *Bagnell v. Dry*, 1 P. Wms. 700.

(d) *Vide Dong.* 799.

17. *Aumble versus Jones.*

[Hill. 7 Ann. C. B.]

UPON a special verdict in *ejectment* the case was, that *Anthony Gull* was seized in fee, and devised to his daughter for life; after that to *A.* the eldest son of his daughter, and his heirs; and, for want of such heirs, remainder to the right heirs of *J. S.* And it was agreed, that *J. S.* being alive when the remainder after limited was to commence, that that remainder was therefore utterly void by this event, whatever it was in its creation. Secondly, That the common and legal construction of words shall be taken, where it does not appear from a necessary or plain implication that the intent of the devisor was otherwise, and therefore that the limitation to *A.* and his heirs was a fee-simple and not an estate-tail; for he might mean for want of heirs general, and there is nothing that plainly shews he meant otherwise, and that by consequence the remainder to the right heirs of *J. S.* was void in its creation. *Vide Cro. Car. 57. Cro. Jac. 416.*

Ante 226. Remainder to the right heirs of *J. S.* void, the particular estate determining in the life of *J. S.* Legal sense of the words to be taken, if the contrary not plainly implied. *Cro. Car. 185, 186. Vide 1 Wms. 663. 2 T. R. 720. Hodgson and Ambrose, Doug. 341.*

Ante 234.

18. *Hopewell versus Ackland.*

[239]

[Hill. 8 Ann. C. B. Comyns 164. S. C.]

IN *ejectment* a special verdict was found, viz. *John Ackland*, being seized in fee of the lands in question, devised an annuity to *H.* in fee. Item, I devise my manor of *Bucknall* to *A.* and his heirs. Item, I devise all my lands, tenements, and hereditaments to the said *A.* Item, I devise all my goods and chattels, money and debts, and whatever else I have not before disposed of, to the said *A.*, he paying my debts and legacies; and makes him executor. And now the question being, What estate *A.* had in the lands, tenements, and hereditaments? it was urged that the *item* conjoined the sentences, and carried on the testator's intent, and imported a meaning to give the like estate, as was before expressed in the precedent sentence, like *Moor* 52. Also the word *hereditament* imports an inheritance. *Vide 2 Lev. 169.* The statute 12 *Car. 2.* gave the crown the lands, tenements, and hereditaments of the regicides; and it was held that the inheritance in tail of one of them passed by those words. *Et per Trevor, C. J.* Item is an usual word in a will to introduce new distinct matter: therefore a clause thus introduced is not influenced by, nor to influence a precedent or subsequent sentence, unless it be of itself imperfect and insensible without reference; therefore

Whatever else I have not before disposed of will carry a fee in a will. 2 Vent. 285. Mod. Cases, &c. 223. 3 D. 201. p. 7. S. C. 1 Willson 333. Comyns 337, 8, 9. Mod. Ca. 108.

Exposition of the word *item* in a will.

Yelv. 210.
 1 Ro. Ab. 844.
 M. 1 Sid. 105.
 1 Vent. 299.
 2 Jo. 57.
 2 Mod. 130.
 2 Lev. 169.
 Pollex. 185.

2 Vent. 285.

not here, where both clauses are perfect and sensible; and the word *hereditament* cannot be taken to denote the measure or quantity of estate; because it has a proper meaning, and extends to annuities, advowsons in gross, &c., which are not comprised by the words *lands and tenements*: And the reason of the case in 2 Lev. 196. was not from any such import of the word *hereditament*, but because a forfeiture of their lands was reasonably construed the forfeiture of the lands, and their estate therein forfeitable for such crime: But by the concluding clause, *whatever else he had not before disposed of*, he held an estate in fee passed (a), relying upon *Alleyne* 28., *Wheeler's* case, and 2 Vent. *Willow's* case; for it could not have any effect on the personal estate, because that was given away as fully as possible by the words precedent, therefore it must extend to remainders, &c.; and this he held to be enforced by the latter clause, *paying*, &c., and the annuity in fee.

(a) Vide 1 Ld. Raym. 187. *Doe v. Cowp.* 215. *Hogan v. Jackson, Cowp.* Richards, 3 T. R. 356. *Grayson v. Atkinson*, 1 Wils. 333. *Roe v. Blackett*,

19. Thomlinson *versus* Dighton.

[Pas. 10 Ann. B. R. Comyns 193. S. C.]

Devise to A. for life, and then to be at her disposal to any of her children, gives an estate for life, with a power to dispose of the fee. Cart. 232. Cases L. E. 31. S. C. 1 Will. Rep. 149.

* [240]

Vide Str. 935. Ambler 750.

2 Show. pl. 28.
 1 Lutw. 762.
 4 Leon. 41.

ERROR on a judgment in *C. B.* in ejectment, where- in a special verdict was found to this effect: *H.* seised in fee, devises to his wife for her life, and then to be at her disposal to any of her children who shall be then living. *H.* dies leaving a son and a daughter, and his wife, who then enters and marries a second husband, and the second husband and she, by lease and release, convey the lands to *A.* and his heirs, to the use of the wife for life, without impeachment of waste, remainder to her daughter and the heirs of her body, remainder to the son and his heirs, with a power to revoke and limit new uses: The first question was, Whether the wife had an estate in fee, or only an estate for life, with a power to dispose of the inheritance? And the Court held this to be only an estate for life, with a power to dispose of the inheritance. *Et per Parker, C. J.* The difference is where a power is given with a particular limitation and description of the estate, and where generally, as to executors to sell or to give; for he that can give or sell an estate in fee, must have an estate in fee. 2dly, The question was, Whether this power could be construed as a power appendant to the estate for life, so as by the destroying of that it might be destroyed or extinguished; or a collateral one? And *Powell, J.* said, This was not a power appendant or appurtenant, nor was it in the

the nature of an emolument to the estate, like a lease for life, with a power to make a lease for twenty-one years; for that affects the estate for life. and is concurrent with it, and has its being and continuance, at least for some part, out of it; but this power arises after the estate, and has its effect upon another interest; so that the estate for life is perfect without it, and no ways altered nor affected by the execution of it. *Et adjournatur.* And afterwards at another day, *Parker, C. J.* delivered the opinion of the Court, that this was only an estate for life, and that the disposing power was a distinct gift; because the estate given is express and certain, and the power comes in by way of addition: And that this differs from the other cases, which are general and indefinite, viz. A devise to *J. S.*, and that he shall sell; or a devise to *J. S.* to sell, &c. In these cases, because the party is empowered to convey a fee, he is construed to have one; he having no express estate divided from the power; but here the power is a separate gift distinguished from the estate, and the estate given is a certain and express estate. *Vide 10 H. 8. 9. 1 Inst. 9. Mo. 57. 3 Lev. 71. 1 Jones 137. Lat. 91, 34. 2 Lev. 104. 1 Mod. 189.*

2 Leon. 68. Latch 9, 39, 130. Difference between a power appendant to the estate, and collateral. Cro. Car. 16, 160. 3 Leon. 71. Br. Devise 39. 1 Leon. 159. 1 Buft. 219, &c. 2 Jon. 107, 113, 137. 1 Roll. Abz. 329, 9. 2 Lev. 58, 62.

Discent.

[241]

1. The Lessee of Carter *versus* Tash.

[Hill. 6 W. M. *At Nisi prius, coram Holt, C. J.*]

IN *ejectment* these points were held for law by *Holt, C. J.* 1st, If lessee for years be made tenant to the *precipe* by lease of a freehold to suffer a common recovery, that by this the term is not merged, but preserved and revived by the saving of former rights in the statute 27 H. 8. of uses.

Holt 254. S. C. Far. 73.

2dly, If a termor levy a fine *come ceo, &c.*, this shall not bar him in the reversion, for he may avoid it by plea of *partes finis nihil habuerunt* (a). 3dly, A discent which tolls

Discent que toll entry must be immediate. Co. Lit. 241. b.

(a) *Hard. 401.* If the consor of a fine is only tenant for years, it does not put the landlord out of possession. *Tyssen v. Clarke, 3 Wilf. 541, 556.*

entry

Coverture to
avoid such dis-
cent must be
continual.

entry ought to be an immediate discent; and therefore if a feme disseisors take husband, and hath issue and dies, and after the husband dies, the discent to the issue does not take away entry, because the interposition of tenant by the curtesy does impede it. 4thly, Coverture to avoid a discent ought to be continual from the time of the disseisin to the discent: for if a feme be sole at the time of the disseisin or of the discent, or any time intermediate, her entry is not preserved, because she had an opportunity to enter and prevent the discent. As if a feme covert is a disseisee, and after her husband dies she takes a second husband, and then the discent happens, this discent shall take away the entry of the feme; and upon this last point the plaintiff was nonsuited (a). 1 *Inff.* 338, 246, 353.

(a) This point is established in the case of *Stowell v. Ld. Zouch*, *Plowd.* 355., and confirmed in *Doe ex dem. Darome v. Jones*, 4 *T. R.* 300. where it is agreed *per Curiam*, that on every

statute of limitations, if a disability be once removed, the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary.

2. Clerk *versus* Smith.

[*Hill.* 10 & 11 *Will.* 3. C. B. Rot. 1257. *Comyns* 72. S. C.]

Where the same estate is devised to H. which he would have taken by discent, he is in by discent, notwithstanding the possibility of a charge. *Hob.* 30. *Vaugh.* 271. 2 *Sid.* 80. *Mod. Cases* 23. 1 *Lutw.* 193. S. C. N. L. 244. *Clift.* 27. *Lev. Ent.* 125. *Lex Man.* 149.

* [242]

3 *Lev.* 127. *Post* 423. 2 *Lev.* 60, 79. *Plowd.* 345. *Owen*

[*N ejectment* on a special verdict the case was, *J. S.* devised lands to his daughter's son [who was also his heir] and to his heirs, upon condition that he should pay 200 *l.* to such a person out of the said lands, as the wife of the devisor would appoint by her deed. The grandson entered, and the wife made no appointment; then the grandson died seised, leaving an heir *a parte materna*, under whom the plaintiff claimed, and an heir *a parte paterna*, under whom the defendant claimed. The question was, Whether the grandson was in by discent, or in by * purchase under the will: And it was adjudged, that he was in by discent, and not by purchase, for the devise gives him the same estate the law would have given him, under a possibility of being charged, which never happened (b); by consequence, as the grandson took it as heir *a parte materna*, he shall transmit it in the same manner to his heirs *a parte materna*: And *Treby C. J.* and *Powell J.* denied *Gilpin's* case, *Cro. Car.* 161. *Vide* 2 *Mod.* 286.

(b) Whenever a devise gives to the heir the same estate in quality as he would have by descent, he shall take by the latter, which is the title most favoured by law, and merely charg-

ing the estate with debts and legacies will not break the descent. *Harg. Co. Lit.* 12. b. n. 2. *Allen v. Heber*, 1 *Bl. Rep.* 22. *Hurst v. Earl of Winchelsea*, *Bar.* 879.

Dy.

Dy. 124. 3 Leon. 64, 70. Cro. El. 833, 919. Mo. 644. 125, 148. Mo. 593, 600. Cro. Car. 161. Cro. El. 313, 840. 1 Co. 105. Mod. Cases 23.

3. Reading *versus* Royston.

[Hill. 1 Ann. B. R., Comyns 123. S. C. 2 Ld. Raym. 829.]

H. Had two daughters, one of them had issue a son and died, *H.* devised the land to the son and his heirs for ever. And the question was, Whether the son should take all by the devise, or the one moiety by discent, and one moiety by devise? For then, as to that moiety he takes by discent, his aunt will be coparcener with him. Mr. *Cowper* argued, that where two titles concur, the elder shall be preferred; and that as to one moiety, which the grandson has by the devise, he has the same estate in it, and no other by the devise, than he would have without it; and therefore since the devise works no alteration in point of estate as to that, the grandson shall take it *in potiori jure*, which is by discent: as if the father having some lands borough-english, and some frank-fee, should devise all his lands to his eldest son and his heirs. But it was resolved by the Court, that the eldest son should take all by the devise, and could not take a moiety by the discent as heir, and a moiety by the devise; for there can be no such discent as the discent of a moiety to one coparcener as heir; one cannot plead a discent *uni filie & coheredi*, but it is a discent to all: And the Court agreed the rule, *viz.* Where a devise to an heir gives the same estate which would descend, the devise is unnecessary, & *nihil operatur*; it has no effect, and therefore it is void: But here is not a devise to an heir; both coparceners make the heir, and the one is not an heir without the other; and supposing the devise void as to one moiety, the other moiety must descend to both: But the grandson must take by the devise in this case, because nothing can descend to him *ut uni coheredi*. Afterwards a point was stirred in this case upon the statute of limitations, for which see title *Limitations*.

H. having two daughters, one has a son and dies, and H. devises to the son, he takes the whole by devise. 1 Co. 93, 94, &c. Moor 136. pl. 281. 1 And. 69. Ow. 65. Post 423. S. C. Prec. Ch. 222. 1 Leon. 112. Gouldf. 141. Cro. El. 431. 3 Lev. 127.

There cannot be a discent of a moiety to one coparcener as heir. Co. Lit. 163. b. Palm. 373. 2 R. R. 352. Co. Lit. 26, 6.

4. Clements *versus* Scudamore.

[243]

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1024. S. C. 1 Wms. 63. S. C.]

IN *ejectment* a special verdict was found, *viz.* *A.* had five sons, and the youngest son died in the life of the father, leaving issue a daughter, after which the father purchased

6 Mod. Cases 120. S. C. Holt 124. Borough-english lands de-

Send to the representative of the youngest son.
 1 Roll. Abr.
 502. 1 Sid. 267.
 1 Keb. 925.
 2 Keb. 111.
 2 Danv. 110.
 1 Lev. 172, 293.
 2 Lev. 138.
 Styl. 115, 6.
 4 Inst. 142.
 1 Mo. 102.
 2 Sid. 61. Cro.
 Car. 411. Cro.
 Jac. 198.

2 Danv. 184.
 pl. 2. Difference between general customs, where of the law takes notice, and special. Co. Lit. 110, 175. b.
 Dyer 196. Mar. 45, 54.

Where custom makes an heir, the law implies all incidents in course of discent. 1 Mod. 96. 3 Keb. 165.
 2 Roll. Abr. 780. Noy 115.
 1 Roll. Abr. 623. pl. 1, 2, 3.
 501. 6 Mod. 120. 1 Lev. 172.
 1 Sid. 198. 1 Ju. 360. 2 Lev. 87.
 2 Danv. 542.
 pl. 2. 549. pl. 4.
 5. 3 Keb. 475.
 486, 478.

* [244]

purchased copyhold lands of the nature of borough-english, which by custom were descendible to the youngest son and his heirs. The father died seised, and the fourth son entered; and now the question was, Whether the fourth son, or the daughter of the fifth son, should inherit these lands: And *Holt, C. J.*, delivered the resolution of the Court, viz. The daughter shall inherit *jure representationis*; for by this custom the youngest son is put in the place of the eldest at common law; and as at common law the issue of the eldest is preferred *jure representationis*, so by this custom shall the issue of the youngest. If a man seised of lands of the custom of gavel-kind have issue three sons, and one of the three dies, leaving issue a daughter, in the life of his father, this daughter shall inherit the part of her father, and yet she is not within the words of the custom; which *vide Rast. 143. a.* § gavel-kind, *terra inter heredes masculos partibilis & partita*, for she is no male, but the daughter of a male, and heir by representation. In the year 1560, there was a case between *Fane and Barr*; it is entered *Hill. 1659. Rot. 779*. The custom was, that the copyhold-land of every tenant dying seised descended to the youngest son. A surrender was made to the use of *A.* and his heirs; *A.* died before admittance, and it was agreed his youngest son should inherit if *A.* had been admitted; but in this case *A.* being not admitted, it was adjudged the eldest son should inherit; and that is by reason of the strictness of the custom, which required a seisin and a dying seised; but, by the report I have of that case, the Court said it had been otherwise, if this land had been found to be of the custom of borough-english or gavel-kind; for the law takes notice of these customs, but not of such special customs which must be pleaded by him that would take advantage of them, and must be taken by the Court to be as they are set forth by the pleading, and no otherwise. In the case at bar, the custom is expressly found to be descendible to the youngest son and his heirs, though the words *his heirs* are needless, for the law would imply all necessary incidents and consequences in the course of discent. If the father be disseised and die, the right of entry shall descend to the youngest son; if the youngest son die, the same right of entry shall descend to his daughter; and the youngest son, being heir by custom, shall have his age as if he were heir at common law. And the Court denied the case * of 1 *Leon. 109, 208.*, and inclined against the opinion of *Croke*, in 1 *Cro. 410.*, *Reever versus Malher*, and said, if a lease be made to *H.* and his heirs, for three lives, of lands of the nature of borough-english, this descendible freehold shall go to the youngest son, though it is a new created estate, for the custom is inherent in the land; and so it is of a rent, for it issues out of the land;

and the introducing the same rules of descent in all cases relating to the same lands, tends to quietness and certainty.

Discontinuance of Estate.

Hunt *versus* Burn.

[Hill. 1 Ann. B. R.]

A. Tenant in tail levies a fine to the use of *J. S.* for the life of *J. S.* with warranty, and after that levies a fine to the use of himself and his heirs with warranty, and after that bargains and sells to another and his heirs. *Ex per Holt C. J.*, and *Powell*, it was held,

1st, That the first fine made a discontinuance, but it was only a discontinuance for the life of *J. S.*, because the wrongful estate that causes the discontinuance was only an estate for his life, and the discontinuance could remain no longer than that estate.

2dly, The second fine could not enlarge the discontinuance, because the estate raised by the fine returned back to the conusor, and consequently the warranty which was annexed to it was extinguished; and it would be a vain thing to make a discontinuance for the sake of that warranty which was destroyed in its creation.

3dly, Suppose the second fine had been levied to *R. S.* a stranger, yet during the life of the first conusor this second fine makes no discontinuance, because the estate was turned to a right by the first fine, and the second fine could not turn it more to a right; so as it is not a present or an immediate discontinuance; but if the first conusor die in the life of tenant in tail, then it becomes a discontinuance; for the new reversion which tenant in tail gained, and to which the warranty was annexed, is executed in possession in *R. S.*, and there was no right of entry or action in any body when the estate was executed; for the tenant in tail could not enter, and the issue had no right; and they compared it to *Litt. sect. 620, 622.*

And *Powell, J.* said, It was thought anciently that no advantage could be taken of a warranty but by pleading:

X 2

A tenant in tail levies a fine to *B.* for *B.*'s life, with warranty, and after levies a fine to the use of *A.* and his heirs, with warranty. *Holt 255. S. C. Ante 57. Post 339; 422.* Discontinuance remains no longer than the wrongful estate that causes it. *Co. Lit. 336.*

Co. Lit. 333.

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1 Jon. 210.
Cro. Car. 152.
Lat. 64, 72.

If

If the issue could enter they thought the warranty was lost, and therefore created discontinuances in safeguard of the warranty: But it is otherwise now. *Vide 10 Co. 97. b.*

There may be discontinuance which turns the estate to a right, and not take away entry.

Lut. 770, 782.
Jones 209. Br.
Discent 3.
1 Inst. 333.
21 H. 8. 22, 23.

And he held there might be a discontinuance, which turns the estate to a right, and yet does not take away the right of entry, and that a warranty might bar where the reversion was only displaced and turned to a right, though the right of entry was not taken away. As if tenant in tail makes a lease for the life of lessee, and after grants his reversion to J. S. and his heirs with warranty, this warranty is annexed to an estate in fee, and yet here is no immediate discontinuance, so as to toll the right of entry; nevertheless, if this warranty descend upon the issue, and there is assents, this will be a bar, which shews a warranty may bar without a discontinuance.

N. The judgment in this case was affirmed in *Dom. Proc.* 1 Bro. P. C. 53.

Disseisin, Seisin.

1. Smartle *versus* Williams.

[Pas. 6 W. & M. B. R.]

Mortgagee covenants that mortgagor shall quietly enjoy till default of payment, and assigns. After assignment mortgagor is only tenant at sufferance, but his continuing in possession does not turn the term to a right.
3 Lev. 387. S. C.
Post 2 So. S. C.
Holt 478. Comb. 247.

* [246]

ON a trial at bar the case upon evidence was: A man made a mortgage for years to *A.*, who without the mortgagor's joining assigned it to *B.*, who assigned to *C.*, under whom the plaintiff in ejectment claimed; and it was objected by *Levinz*, that though he admitted the first mortgagee might well assign without making any entry or joining the mortgagor, who is but tenant at will to the mortgagee, and his possession as such is but the possession of his * mortgagee; yet the assignment of the first mortgagee determined the lease at will, and the mortgagor thereby became tenant at sufferance, and his continuance in possession divested the term, and turned it to a right, so that it could not be assignable without *B.*'s entry on the mortgagor's joining; that it was at least a divesting of the term at the election of the assignee according to *Blunder and Darw's case*, 1 Cr. 305. And *B.* the assignee had made

made his election, and brought an ejectment against the mortgagor, which admitted his being out of possession; and they shewed the record itself, wherein the assignee was lessor of the plaintiff. *Sed per Holt, C. J.* Upon executing the deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will (a), and the assignments of the mortgagees could only make the mortgagor tenant at sufferance, but his continuing in possession could never make a disseisin, nor divesting of the term: Otherwise, if the mortgagor had died and his heir had entered; for the heir was never tenant at will, but his first entry was tortious; or if the mortgagee had entered upon the mortgagor, and the mortgagor had re-entered; for the mortgagee's entry had been a determination of the will, and the re-entry of the mortgagor had been merely tortious. And as to the bringing an ejectment, it was said, that could not admit an actual divesting, so as to turn the term to a right, for that was not brought to recover the mortgage-term, but the actual possession only; for the recovery of which the assignee of the first mortgage had no other way but this, or to make a forcible entry, which the law forbids; nor does the assignee appear a party to the record, but only a lessor of the plaintiff; so that this record can be no evidence or estoppel against him, and the Court will take notice that an ejectment is only a fictitious proceeding for recovering the possession which cannot well otherwise be obtained; and the entry laid in the declaration or confessed by the defendant, is not an entry that is real; for it shall neither avoid a fine, nor be sufficient evidence to support trespasses for the mean profits (b).

The Court takes notice that an ejectment is only a fictitious proceeding.

(a) The doctrine of mortgagor being tenant at will to the mortgagee, is discussed much at length by Lord Mansfield, and Ashurst, J. in *Mosi v. Gallimore*, Doug. 279. (265.) and by Buller, J. in *Birch v. Wright*, 1 T. R. 3-8; and it is shewn that the expression is only applicable by way of comparison. That although some of the qualities of a tenancy at will subsist between mortgagor and mortgagee, others do not. And that when a question arises between a mortgagor and mortgagee, it will be quite sufficient to call them so without having recourse to any other description of men, or to what they are most like. "It is now established that a mortgagor

has an actual estate in equity, which may be devised, granted, and entailed; that the entails of it may be barred by fine and recovery, but that he only holds the possession of the land, and receives the rents of it, by the will or permission of the mortgagee, who may by ejectment, without giving notice, recover against him or his tenant. In this respect the estate of a mortgagee is inferior to that of a tenant at will. In equity the mortgagee is considered as holding the lands only as a pledge or security for payment of his money." *Butler's Co. Lit.* 205. a. n. 1.

(b) *Vide Taylor v. Horde*, 1 Bur. 60, 114. *Doe v. Horde*, Cowp. 689. *Butl.* n. 1 to *Co. Lit.* 330. b.

2. Anonymous.

[Trin. 3 Ann. B. R.]

1 Sid. 385. Ef.
fect of a bare
entry. Co. Lit.
181. a. 1 And.
134. 1 Leon.
210. 2 Leon.
147. Ow. 96.
Comp. 689.

PER Holt, C. J. A bare entry on another without an expulsion, makes such a seisin only that the law will adjudge him in possession that has the right, and so are the words *intravit & fuit inde seist. prout lex postulat*, to be understood in special verdicts; but it will not work a disseisin or abatement without actual expulsion.

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Distress.

1. Walter *versus* Rumball.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 53. S. C.]

S. C. 4 Mod.
385, 390. Cases
B. R. 6. Comb.
336. Distress in
two hundreds,
viz. A. and B.
in different
counties. Oath
upon sale admi-
nistered by the
constable of A.
in B. well.
45 E. 3. 9.

TROVER for six hogs; special verdict was found, viz. That the lands demised lying in two counties, viz. Part in the hundred of *A.* in *Wilt.*, and part in the hundred of *B.* in *Southampton*, the lessor for rent-arrear distrained in both hundreds, and the distress being not replevied in five days, notice was given to the owner of the goods, and then he sent for the constable of *A.*, who, in the presence of the constable of *B.*, sold them in the hundred of *B.* *Et per Cur.* 1st, Personal notice is sufficient, for notice is the thing required. 2dly, Notice to the owner is sufficient against him in trover; but if the tenant had brought a replevin, that would not have served as to him, but he must have had notice also.

3dly, Though the act requires the oath should be administered by the constable of the hundred where the goods are, and here the constable of *A.* administered the oath in the hundred of *B.*, where he had no authority; yet this was held good, because the defendant could not sever the distress, it being entire as the cause was, and the hundreds contiguous, so that the driving was lawful, and a continuance of the first taking (a). *Sed per Cur.* A dis-

(a) *Vide acc. Latch. 60. 2 Wils. 354. 3 Wils. 295.*

tres in *Middlesex* ought not to be driven into a distant county, as *Hampshire*.

2. *Cotsworth versus Bettison*.

[Mich. 8 Will. 3. C. B. 1 Ld Raym. 104. S. C.]

IN a *parco fracto* it is no objection, that the plaintiff shews no title to distress; therefore the defendant cannot justify breaking the pound and taking them out, though the distress was without cause, because they are now in actual custody of law; yet *note*, before impounding he might have rescued.

Where distress is made without cause, the owner may rescue before impounding, but not afterwards. 9 Co.

47. b. 1 Roll. Abr. 673. Mod. Cases 215. F. N. B. 100. 3 Bl. Com. 12. Gibb. on Distresses, 51. 1 And. 51.

3. *Vasper versus Eddows*.

[248]

[Pas. 12 Will. 3. B. R. Rot. 316. 1 Ld. Raym. 719. S. C.]

TRESPASS for breaking the plaintiff's close, &c., and treading down his grafs with hogs, &c. The defendant as to all but one hog pleaded *non cul.*, and as to that pleaded, that the plaintiff distrained it damage-tenant for the same trespass, and impounded it in the common pound; the plaintiff replied, that the hog escaped without his assent; that he neither then nor yet is satisfied for the damage. Upon demurrer it was said for the plaintiff, that the hog was only as a pledge, and that he could not tie it in the pound; and, where a distress dies, the distrainer may distress again. 3 Cro. 162. 2 Leon. 174. pl. 211. 13 H. 4. 17. 2 Inst. 107. Cro. Car. 148., and that where one pleads levy by distress, &c. he must conclude, *et se nil debet*, or *quod adhuc detinet*. 28 H. 6. 6. 35 H. 6. 10. Russ. 175. Co. Ent. 496. Of this opinion was Gould, J. *contra* Holt C. J., Turton, and Powys, who held that there was a time when the plaintiff could not have any action for this trespass, viz. while the hog was in the pound, and it was the plaintiff's fault to put him in a pound which could not hold him; also it is the distrainer's pound. F. N. B. 100. He might have put him in any other place, even into a pound covert; and he does not say it escaped *absque defectu suo*, but *absque assensu suo*. If a distress dies in the pound, the action revives, for the distress failed by the act of God; otherwise where it escapes, especially unless it be made to appear that the plaintiff was in no default, which is not done in this case; for his own default ought not to entitle him to another action, nor subject the

Where distress escapes distrainer cannot bring trespass, unless it be shewn to be wholly without his default; otherwise if it had died. Cases B. R. 6 & 8. S. C. Holt 256.

Yelv. 96. 1 Roll. Abr. 879. pl. 2. Noy 119. Cro. Jac. 147.

Vi. Parker 129. defendant to a double punishment for the same cause, viz. the loss of his pig, and the damages and costs of this action.

4. Vinkestone *versus* Ebdon.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 384. S. C.]

Carth. 357.
5 Mod. 159.
Anchor and sails
of a ship: distrain-
able for port du-
ties. Case. B. R.
216. S. C. Holt
674. 3 Lev. 37.

Special verdict
found upon a
single point.

* [249]

TROVER for his anchor and sails; upon not guilty pleaded, a special verdict was found, viz. That the mayor and burgesses of *Newcastle*, by custom time out of mind, had used and ought to repair the port there, and had in consideration thereof a toll of 5s. (a) *per* chaldron of all coals exported, to be paid by the exporter; and for that, by the same custom, had used to distrain any thing distrainable; and that the defendant, being master of a vessel loaded with coals intended to be carried out of the said port, refused, and for this they distrained the said anchor and sails, being part of the tackle belonging to the said ship; and if this was distrainable they found for the defendant, otherwise for the plaintiff: And Mr. *Northey* urged, that the conclusion of the special verdict being upon a special point, the Court could doubt of nothing but what was thereby referred to them. *Vide* 5 Co. 97. 1 Cro. 21. Mo. 261. pl. 420. However, the Court heard and overruled all the other objections, and held, 1st, That it was not necessary the town should shew that they actually did keep the port in repair, for their keeping the port in repair is not the consideration, but their being bound by custom to do it. 2dly, That though the master is not strictly the exporter, yet as to port-duties the master is always looked upon as such, and is the person answerable; for to put them to seek the merchant to answer duties is impracticable, and it is but reasonable the master should pay a duty for the benefit of the port, and that the town should have the duty who are to maintain the port.

11 H. 8. 25.
2 Inst. 133.
Dyer 312. 1 Jon.
397. 3 Bulst.
270. Cro. El.
550.

As to the distress, it was argued, that the instruments of trade are not distrainable, viz. A millstone is not; *averia caruca* are not; a horse in a smith's shop cannot be distrained; that the goods subject to the toll only can be taken, and this was part of the ship, and going from market. *Vide* 3 Cro. 227. pl. 14. Dy. 199. 1 Leon. 231, 105. 3 Cro. 550, 569. *Noy* 68. 1 Inst. 47. 1 Sid. 348. Dy. 312.

(On the other side it was said, *Averia caruca* are not privileged where there is no other distress (b). *Vide* *Flat*, 51 H. 3. 2 Inst. 122, 133, 565. So it is of instruments

(a) In Lord *Raymond's* Report, 5d.

(b) *R. acc. Gorton v. Falkener*, 4 T. R. 565. *Vide* Cro. El. 596.

of trade, as if there be two millstones, or *averia otiosa*.
Mo. 214. *Dy.* 302. *Godb.* 67. *Ow.* 139. A boat is dis-
 trainable, *ergo* a ship, and *ergo* a sail of a ship. *Dy.* 117.
pl. 73.

Sed per Holt, C. J. The duty arises from the goods load-
 ed on board the ship, with which the master is charge-
 able; therefore the ship, and every thing there of the
 master's, is chargeable as well as the goods. And the de- *Str.* 1128.
 fendant had judgment.

5. Gifbourn *versus* Hurst.

[*Hill.* 8 Ann. C. B.]

IN *trover* upon a special verdict the case was, 'The goods
 in the declaration were the plaintiff's, and by him de-
 livered in *London* to one *Richardson*, to carry down to *Bir-*
mingham. 'This *Richardson* was not a common carrier, but
 for some small time last past brought cheese to *London*, and
 in his return took such goods as he could get to carry back
 in his waggon into the country for a reasonable price.
 When he returned home, he put his waggon with the
 cheese into the barn, where it continued two nights and a
 day, and then the landlord came and distrained the cheese
 for rent due for the house, which was not an inn, but a
 private house; and it was agreed *per Cur.*, that goods de-
 livered to any person exercising a public trade or employ-
 ment to be carried, wrought or managed in the way of his
 trade or employ, are for that time under a legal protec-
 tion, and privileged from distress for rent; but this being
 a private undertaking required a farther consideration; and
 it was resolved, that any man undertaking for hire to carry
 the goods of all persons indifferently, as in this case, is,
 as to this privilege, a common carrier; for the law has
 given the privilege in respect of the trader, and not in re-
 spect of the carrier; and the case in *Cro. El.* 596. is
 stronger. Two tradesmen brought their wool to a neigh-
 bour's beam, which he kept for his private use, and it
 was held that could not be distrained (a).

H. undertaking
 to carry goods of
 all persons indif-
 ferently for hire,
 is a common
 carrier, and the
 goods are privi-
 leged.

[250]

Co. Lit. 47. a. b.
 3 *Bulfr.* 270.
Ante pl. 4.

Noy 68.

(a) *Vide Francis v. Wyatt*, 3 *Bur.* 1498. 1 *Bl.* 483. in which it was de-
 termined, that a carriage standing at
 livery is not exempted from distress. In the former report the general doc-
 trine upon the subject is very fully dis-
 cussed.

Domina Regina *versus* Speed. *Mich.* 1 Ann.
B. R. *Vide Title* Information.

Distribution.

1. Pett *versus* Pett.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 578. S. C. Comyns 87.
S. C. 1 Wms. 25. S. C.]

Brother's grand-
children cannot
share with bro-
ther's children.
3 Salk. 138.
S. C. Cases B. R.
409. Holt 259.
1 Will. Rep. 51,
594. Ray. 496.
3 Mod. 58.
1 Vent. 307,
316, 323, 328.
1 Mod. 209.
2 Mod. 204.
2 Lev. 173.
2 Vent. 317.
3 Keb. 669.
3 Jo. 93. Style
174. All. 36.
Moll. 316, 369.
2 Vern. 170,
233. Prec. Ch.
28.

MR. *Lechmere* moved for a *mandamus* to the ordinary to make distribution on the 22 & 23 Car. 2. cap. 10. And the question was, Whether the brother's grandson should have a share with the daughter of the sister of the intestate? The words of the act are, *provided no representation be admitted amongst collaterals after brothers' and sisters' children*: And it was urged, that this act was a remedial law to prevent the mischief of administrators sweeping away the whole personal estate of the intestate, and therefore to be taken largely; *sed non allocatur per Cur.* For brothers' children are the children of the intestate's brother; for the intestate is the subject of the act; it is his estate, his wife, his children, and by the same reason his brother's children; for he is equally the correlative to all, *Vide 1 Vent. Tracy's case*, in which *Holt, C. J.* said a consultation was at last awarded.

[251]

2. Blackborough *versus* Davis.

[Pas. 13 Will. 3. B. R. 1 Ld. Raym. 684. S. C. Comyns 96.
S. C. 1 Wms. 40. S. C.]

Aunt not en-
titled to distri-
bution with
grandmother,
the latter being
nearer a-kin.
Ante 38. S. C.
Cases B. R. 615.
Holt 43. Prec.
Ch. 527. 1 Eq.
Ca. Ab. 249.
Ex. and Ad. E.
pl. 5. 2 Vez.
215. 1 Vez.
333. Amb. 191.

Administration being granted to the grandmother, the aunt moved for a *mandamus* to have it granted to her, which was denied, (*quod vide* title *Administrator*, pl. 6.) and now she moved for a *mandamus* to have a distribution, being in equal degree; and Dr. *Lane* urged she was not entitled to it, being not so near as the grandmother; for the grandmother stands in the place of the mother, and is in the second degree to the intestate: The aunts are the daughters of the grandmother, and the daughters cannot be in equal degree with their mother. Before the stat. 1 Jac. 2. c. 17., if one died without wife or child, his mother had all, and his sisters and brothers nothing. The father surviving has all at this day; and the

the reason of making that act was, because the mother might marry and carry all away to another husband. *Et per Holt*, Chief Justice, at another day, No *mandamus* ought to be in this case. By the common law, before and at the Conquest, the children, both male and female, inherited alike, and the estate, whether real or personal, descended to all equally. *Seld. Eadm.* 134. *Lamb Sax. Laws* 36. *fo.* 167. In the reign of *H. 1.* females began to be excluded as to the real estate, and the males inherited equally the socage-land. *Glanv.* l. 7. c. 3. At that time the land descended to the father, if the son died without issue. *Lamb.* 202, 203. *L. L. H.* 1. c. 70. And yet about this time, or in the time of *H. 2.*, the father and mother began to be excluded as to the real estate, but not as to the personal. And as by common law father and mother were nearer than brother or sister, grandfather and grandmother are nearer than uncle and aunt. And the grandmother in this case is the root of the kindred; whereas the aunt is only a branch (a).

Old law of distribution and inheritance.

Half blood have equal share with whole blood.
1 Vent. 323.
2 Vent. 317.
1 Show. 1.
Ante pl. 1.
2 Chanc. Rep. 376.

(a) The computation of proximity grees of consanguinity, *vide* 2 *Bl. Com.* 202. *Harg. Co. Lit.* 23. *b.* not of the canon law. *Precc. Ch.* 593. 1 *Bl. Law Tracts*, 14, 173. 2 *Bl. Com.* 504. Concerning the de-

3. Archbishop of Canterbury *versus* Willis.

[Hill. 6 Ann. B. R.]

P F R Cur. Any person that is entitled to distribution within the stat. 22 *Car.* 2. c. 10., is by consequence entitled to sue the administrator in the ecclesiastical court to make good his account by proofs, and examination upon oath, as a legatee was against an executor before that statute. *Vide* the report of this case at large, title *Executors*.

Administrator's account. *Post.* 3. 6.

Dower.**1. Mordant *versus* Thorold, Bar.**

[Trin. 2 W. & M. B. R. Intr. Hill. Ult. Rot. 340.]

Tenant in dower dies before writ of inquiry executed; administrator cannot bring sci. fa. for the damages and mesne profits. Carth. 133. 3 Lev. 275. Lev. Ent. 76. 1 Lev. 38, 39. Yelv. 112, 3 Mod. 281. S. C. 1 Show. 97. Carth. 133. Holt 305.

THE plaintiff brought a *scire facias* as administrator of the lady *Thorold*, upon a judgment in dower obtained by her against the defendant, to have the value of the damages, costs, mesne profits, and waste, from the time of the death of the husband, *qui quidem valor attingit ad 670 l.*, which judgment was removed by writ of error out of *C. B.* into *B. R.*, and there affirmed; after which, and before the writ of inquiry executed, the lady died, and administration was committed to the plaintiff, who brought this writ. The defendant pleaded, that no damages were adjudged to the feme in her life-time, &c. And the plaintiff demurred, and the Court resolved that this was a good plea; for if damages had been ascertained upon the writ of inquiry, and judgment thereupon, they had then vested in the intestate as a debt, and the administrator should have had them; but she dying before the final judgment, and when the damages were due to her only by way of satisfaction for an injury, which is in nature of a trespass, and the writ of inquiry being in nature of a personal action for them, it dies with the person, and a *scire facias* lies not for the executor or administrator. Judgment for the defendant. *Noy* 126. 3 *Lev.* 275. *Show.* 97. S. C.

3 Mod. 281.

2. Burdon *versus* Burdon.

[Pas. 3 W. & M. B. R. Rot. 292.]

Show. 271. Detainer of charters is no plea after imparlance. 9 Co. 18. a. 19. a. Comb. 183. S. C.

ERROR on a judgment in *Durham* in a writ of dower; the defendant after imparlance had pleaded detainer of charters, and upon demurrer judgment was given by the Court for the defendant, which was now affirmed; for *per Cur.* He that pleads this plea must plead, that from the time of the death of his ancestor *paratus fuit & adhuc paratus existit* to assign her dower, if she would deliver the charters (a).

(a) A dowress is now considered as for her dower, if she prefer such mode entitled in all cases to come into equity to proceeding at law; and though she die

die before her right to dower be established, equity will decree an account of the rents and profits of the estate of which she was dowable in favour of her representatives. *Curtis v. Curtis*, 2 Bro. 620. *Wakefield v. Child*, Fenblanque's *Notes to Treatise of Equity*, 147.

3. The Lord Gerard *versus* The Lady Gerard. [253]

[Hill. 7 Will. 3. B. R. Intr. in C. B. Mich. 5 W. & M. Rot. 445. 1 Ld. Raym. 72. S. C. And see the entry in 3 Ld. Raym. 342.]

ERROR of a judgment in *C. B.* given in a writ of dower, where the tenant as to part confessed the action, and judgment was given in *C. B.*, and a *misericordia* entered against the tenant; and as to the rest, the tenant pleaded, that the messuage in demand had, time out of mind, been called as well *Gerard's Bromley*, as *Bromley-Hall*; that Sir *Thomas Gerard* was seised thereof in his demesne as of fee; and being so seised, King *James I.*, by letters patent under the great seal of *England*, created the said Sir *Tho. Gerard* Baron of *Gerard's Bromley*, and that he was commorant with his family in the said capital messuage, and so the messuage in demand became, and had ever since continued, *caput baronia*, and brings down the descent both of the barony and messuage to himself, and demands judgment, if of the third part thereof the demandant ought to be endowed. The demandant demurred, and judgment was given in *C. B.* for the demandant, and another *misericordia* entered against the tenant, who now brought error, and assigned for error,

Feme shall be endowed of the capital messuage. Vide the record at large in Lev. Entries 76. 3 Lev. 401. S. C. Holt 260. 5 Mod. 64. Comb. 352. Skin. 593. Cases B. R. 84.

1st, That the demandant ought not to be endowed of *caput baronia*, because it is for the honour of the kingdom to have the chief seat kept entire; and for authorities were cited 1 *Instr.* 31. b. *F. Abr. Dower* 180. *Bract. lib.* 2. 170. b. *P.* 4 *H.* 3. *Rot.* 7.

Co. Lit. 165. a.

2dly, That there ought not to be two *misericordias*; for it is repugnant to this maxim in law, *quod nemo bis puniatur pro uno delicto*; and so is *Specol's* case, 5 *Rep.* 57., and *Peytoe's* case. As to the first point, Serjeant *Wright* and Mr. *Northey*, for the defendant in error, argued, that the authorities cited of the other side were of feudal baronies, of which there were not any remaining at this time except *Arundel*; of which opinion were the whole Court; *et per Rokelby*, J. That was the ground we went upon in *C. B.* *Et per Holt*, C. J. Feudal baronies were when the king, in the creation of the baronies, gave lands and rents to hold of him for the defence of the realm. But the king could not make this a barony which was in the seisin of the *Gerards* before. As to the second point, the counsel argued,

Ante 54.

Feudal barony quid. None at this day except *Arundel*.

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gued, that here were two delays, which are two several offences, and two several judgments, and therefore there should be two several amerciaments; 2 *Leon. pl.* 231. 1 *Ro. Abr.* 213, 218. *Barry's case, Fitz. Abr. Judgment* 32. *Rast. Ent.* 19. *Co. Entr.* 169. *b.*; and that *Specot's case* was not against this, because the second judgment there was erroneous, there being no delay in the defendant. *Br. Amerciament*, 16, 17, 56. insinuates, that where there is a final judgment given, there must be a *misericordia*, and then, if there is a new delay, there must be a new *misericordia*, and *Peytoe's case* is only a saying of the counsel. And judgment was affirmed by the whole Court upon both points. *Vide ante* 54. *pl.* 1.

4. Bates's Case.

[*Hill.* 9 *Will.* 3. *C. B.* 1 *Ld. Raym.* 326. *S. C.*]

Lut. 729. A tenant for life, remainder for years, remainder to A. in tail; A.'s wife shall be endowed; aliter if the mesne remainder had been for life. *Post* 291. 1 *Leon.* 168. 46 *E.* 3. 24. *b.* 22 *E.* 3. 3. *Co. Lit.* 42. *a.* 1 *Rep.* 137. *a.*

TENANT for life, remainder to trustees for ninety-nine years, remainder to tenant for life in tail; tenant for life dies, his wife shall be endowed notwithstanding the intervening estate; for that being for years only, is not to be regarded. At common law the freeholder might destroy it by a feigned recovery; if the remainder in tail had been in a stranger, it would not have obstructed an action of waste; and, as the case is, the party died seised of an estate-tail; otherwise it would have been if the mean intervening estate had been for life; for that had obstructed dower as well as waste.

Ejectment.

1. Knight *versus* Syms.[*Pal.* 4 *W. & M. B. R.*]

Earth. 204. 4 *Mod.* 97. 1 *Show.* 338. Declaration must shew the quan-

EJECTMENT of five closes of arable and pasture, called ———, containing twenty acres in *D.* Upon not guilty pleaded, verdict was for the plaintiff, but judgment was arrested, because ejectment lies not of twenty acres

acres arable and pasture, without shewing how much of the one, and how much of the other; and *clausum* does not help the matter. *Furlinga* is a known measure; so is *bovata*, *bida*, *caruca*, but *clausum* is not so certain in law, and the adding a name to the close is nothing; and *Holt*, C. J. affirmed *Savill's* case for law. *Vide* 2 Cro. 435. *contra*.

[3 Lev. 97. Hard. 133. et vide 1 Bur. 623. 5 Bur. 2673.]

tum of each sort of land. 11 Co. 25. b. 55. Hetl. 146. Lit. Rep. 301. Palm. 413. Cro. El. 339. Ow. 18. Styl. 194. 1 Sid. 229. Comb. 198. S.C. Holt 263. Bull. N. P. 109.

2. Whittingham *versus* Andrews.

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[Mich. 4 W. & M. B. R.]

ERROR of a judgment in ejectment in the court of *Durham*, and the declaration was *de mineris carbonum*, without shewing the number of mines. It was not questioned but an ejectment lies of a coal-mine, 2 Cro. 150. But the uncertainty in not expressing the number was doubted. For the plaintiff it was urged, that the course was so in *Durham*, and that the declaration was according to the plaintiff's lease; and as this was the constant course in *Durham*, so it was well enough understood in those parts, comparing it to the ejectment for so many acres of mountain, in which case this Court would not reverse the judgment, but writ to the justices in *Ireland* to certify whether the practice there could warrant such ejectments; and being certified, this Court did not reverse the judgment. And here the Court were satisfied such ejectments were usual in *Durham*, and affirmed the judgment.

Carth. 277. Ejectment de mineris carbonum, without shewing the number, well in *Durham*. 1 Show. 364. S. C. 4 Mod. 143. Palm. 201. 2 Roll. Rep. 166, 189. Hard. 58. Noy 121. 1 Roll. Rep. 483. Cro. Jac. 150. Comb. 201. S.C. [VI. Doug. 305. (191.) Str. 71.]

3. Smartly *versus* Henden.

[Hill. 8 Will. 3. B. R.]

IN *ejectment* for empty houses, a lease was sealed upon the land, and a declaration delivered to the casual ejector, and judgment and execution had; yet because they had not moved for a peremptory rule to plead, the judgment was set aside; and in such case there must be affidavit of the sealing of the lease, entry, &c.

Ejectment for empty houses. 1 Lill. 498.

4. Anonymous.

[Hill. 10 Will. 3. B. R.]

H. Brought an ejectment in C. B., and at the assizes was nonsuited, and costs were taxed upon the plaintiff; the plaintiff brought a new ejectment in C. B., and a rule

Moultin in C. B. new ejectment brought in B. R. and paid till costs

paid. 1 Vent.
64. Andrews 17.
1 Sid. 279.
[4 Mod. 379.]

a rule was made to stay all proceedings till the costs of the nonfuit were paid. Then he brought an ejectment in *B. R.* and upon producing the rule of the Court of *C. B.* the same rule was made here (*a*).

(*a*) *Vide Barnes* 133. 2 *Bl. Rep.* 904, 1158, 1180. *R. acc. Str.* 555, 583.

5. Anonymous.

[*Hill.* 10 Will. 3. *B. R.*]

Service upon the servant, and acknowledgment of the tenant that he received it, sufficient.
1 *Lill.* 498, 499.
Barnes 175.
2 *Bl. Rep.* 800.
4 *T. R.* 464.
* [256]

A Motion was made for a rule to plead in ejectment; and the affidavit was, That the declaration was delivered to the servant of the tenant in possession; and also that since that the tenant in possession had wrote a letter to him, which he verily believed to be his hand, desiring him, being an attorney for the * plaintiff, to intercede with the lessor (who was a mortgagee) for forbearance; and the rule was granted.

6. Underhill *versus* Durham.

[*Trin.* 11 W. 3. *B. R.*]

Landlord may be joined a defendant if he request it; but is not compellable.
Holt 264. *S. C.*
Lill. Ent. 192.
No objection to admitting landlord that he has privilege of parliament.

1 *Lill.* 497, 499.

THE plaintiff moved that the landlord might be joined a defendant with the tenant in possession; but it was denied; for the Court cannot compel him without his consent; otherwise if he request it himself. In another cause a motion was made on the behalf of the landlord, that he might be made a defendant; and the plaintiff opposed it, because he was a parliament-man. *Et per Holt, C. J.* He must be joined, and we cannot compel him to waive his privilege. *Et per Darnell*: A person privileged cannot be joined to be a plaintiff, but he may be made a defendant, for every one ought to be allowed to defend his own right. *Quere.*

See the statute 11 Geo. 2. ch. 19. s. 12 and 13.

7. Hillingsworth *versus* Brewster.

[*Hill.* 11 Will. 3. *C. B.*]

Church demandable by the name of a messuage.
A special rule to defend quoad a

KING *James I.* by his letters patent granted the impropriation of *Aldgate* to *B.* and his heirs, reserving the right of patronage, &c. and a covenant on the grantee's part to pay the chaplain 10 *l. per annum*, there being

no vicarage endowed out of this impropriation. King Charles II. made Dr. *Hollingsworth* chaplain or curate by grant under the great seal, under which he enjoyed it many years. *Brewster*, the assignee of the patentee, brought an ejectment, and delivered a declaration to the defendant, and had judgment by default, and possession delivered him upon an *habere facias possessionem*; and Mr. Attorney General *Trevor* moved, That the Doctor having no right to the possession, but only a power to enter in order to preach, which the defendant kept him out of by colour of this judgment in ejectment and execution, might be restored; and Serjeant *Darnall* on the same side insisted, that the judgment was irregular, because no declaration was delivered to the tenant in possession, and that the church was not within the demise of a messuage and lands. *Sed per Cur.* If the doctor has no right to the possession, he is not concerned, and therefore cannot complain of the irregularity of the proceeding: And as to his preaching there, he should have come in and moved for a special rule to defend only *quoad* a special right of entry to perform divine service (a). Nobody can complain of irregularity in an ejectment, but the tenant in possession, or the landlord. And sure a church is a messuage, and may be recovered by that name in a *precipe*: But we will hear you again as to that.

right of entry to perform divine service. 11 Co. 25. b.

Mitch, 3 Geo. B. R. Price versus Jones, such a rule granted on Serj. Salkeld's motion.

(a) Such a rule was denied in *Maring* it had been often denied since this case. *in v. Davis*, Str. 914. the Court say-

8. Anonymous.

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[Pasch. 12 Will. 3. B. R.]

THE plaintiff had judgment in ejectment, but was hung up by injunction, so that the term expired. Mr. *Williams* moved to enlarge the term, the injunction being now dissolved. *Sed per Holt*, C. J. We cannot alter records. I have no mind to build a new clock-house (b). *Note*; The same motion was made *Pasch.* 3 Ann. B. R., by Mr. *Wilkinson*, and denied for the same reason; and said, that it could not be done without consent, and that

The term cannot be enlarged without consent. Carth. 3, 178. Mod. Ca. 130.

(b) This alludes to a tradition mentioned in note d to 3 Bl. Com. 408. that with a fine of 800 marks imposed on Ld. Ch. Justice *Hengham* for altering, out of mere compassion, a fine which was set upon a very poor man from 13 s. 4 d. to 6 s. 8 d. A clock-house was built at *Westminster*, and furnished with a clock to be heard into *Westminster-hall*; upon which Sir W. *Blackstone* remarks, that the first introduction of clocks was not till a hundred years afterwards.

in Sir *John Roll's* case (which was cited) the term was enlarged; but it was by consent (a).

(a) In *Doe v. Pilkington*, 4 Bur. 2447. an amendment was allowed in the time of the demise on payment of costs. In *Roe v. Ellis*, 2 Bl. 940. the plaintiff was allowed to enlarge the term, that originally declared on having expired before the commencement of the action. In *Vicars v. Haydon*, Corup. 841. after a judgment in ejectment from *Ireland* was affirmed, the declaration was amended in B. R. by enlarging the term, though the record was remitted to *Ireland*.

9. Anonymous.

[Trin. 12 Will. 3. B. R.]

After a whole term elapsed the plaintiff must give a new notice.

Barnes 173.
Sayer 49.

IN an *ejectment* for lands in *Middlesex*, the declaration was delivered after the esoin-day of *Michaelmas* term; the plaintiff let that term pass without doing any thing, and also till the last day of *Hilary* term in like manner, when he moved for a rule to plead, and, for want of a plea, signed the judgment: And the Court held this to be a surprise upon the defendant, for when he let all *Hilary* term slip without doing any thing, within which time he might have had a trial, he ought to have given fresh notice: As in case a man lets an assizes pass in a country cause without proceeding; wherefore the judgment was set aside.

10. Fenwick's Case.

[Mich. 1 Ann. B. R.]

Court refused a motion to make a person defendant where it appeared a trick to put off the trial. Post 630. S. C. Far. 70, 121, 156. Holt 265, 266.

A Motion was made to make the lessor of the plaintiff's wife a defendant in ejectment, the plaintiff's title being by a pretended intermarriage, which was controverted. *Et per Holt*, C. J. To make the landlord a defendant in ejectment is of right; for otherwise he might lose his possession by combination between the plaintiff and tenant in possession: And the Court inclined to grant the motion, because there could be no inconvenience, and it would make the verdict more considerable; but in regard the wife lived in *Cheshire*, and must have fourteen days notice of trial, and the defendant would not waive that, the Court perceived it a trick to put off the trial, so nothing was done.

11. Withers *versus* Harris.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 806. S. C.]

AN *habere facias possessionem* was sued out upon a judgment in ejectment, after a year and day past after the judgment obtained, without suing out a *scire facias*; and *Montague* argued that there ought to be a *scire facias*, and cited 1 Sid. 361. 2 Keb. 307. *Williams contra* agreed there must be a *scire facias* for the damages, but not as to the term; for till the reign of King *Charles II.* it was doubted whether a *scire facias* would lie on a judgment in ejectment, as appeared by 2 Keb. 55. 1 Sid. 317., and before that time no *scire facias* had been brought; and the plaintiff here, as in the case of a real action, may execute a judgment in ejectment by entry without a writ of execution. 2 Sid. 156. 1 Rol. Rep. 215. *Noy II. Palm.* 263. *Holt, C. J.* said, That as to the possession of the land, an ejectment was real, and was the only remedy for a termor for years, and a recovery in ejectment binds the right and interest of him that has the inheritance, and makes a title in the plaintiff; and therefore the *scire facias* is as necessary in this as in any real action; and in a *scire facias* on a judgment in ejectment, he that hath the inheritance cannot falsify, nor can his heir in fee-simple, nor any one that claims under him, except the issue in tail, and he cannot falsify such a recovery in the point tried, but only in the case of a judgment by default, or else by shewing that the defendant's ancestor made but a feint defence, and did not shew such and such pieces of evidence as he ought to have done; and therefore there is no reason why this case should differ from the general rule of law; so it was ordered, that a *scire facias* should go against the tertenants as well as the defendant: And *Powell, J.* observed, that in annuity a *scire facias* lay upon a judgment.

In ejectment execution cannot be sued after the year and day without sci. fa. 1 Sid. 224, 317. And may be brought either by the plaintiff or his lessor. 2 Salk. 600. S.C. Far. 5, 7, 29, 50, 64, 68. Who may falsify recovery in ejectment. 3 Salk. 319. Holt 77, 265. Post 600.

Contra Skin. 427. 1 Sid. 351. Vide Doug. 72. 2 El. 704, 918.

12. Fenwick *versus* Grosvenor.

[Pasch. 2 Ann. B. R.]

MR. *Fenwick* obtained judgment on a verdict in ejectment on his demise against my Lady *Grosvenor*; upon this the lady brought a writ of error, and pending the writ of error delivered a declaration in ejectment to the tenants in possession, upon her own demise; and now the plaintiff moved for the common rule, and it was denied; for *per Holt, C. J.* No new ejectment shall be brought by

S. C. Far. 70. 156, 121, 170. by the name of Grosvenor and Fenwick. If there be judgment for the plaintiff, and defendant brings a

writ of error, he ought not to bring a new ejectment.

2 Salk. 648,
650. S. C. Holt
265, 266.

* [259]

5 Mod. 88, 350.
6 Mod. 18, 22,
307. 3 Bur.
1290.

the defendant after recovery against him, till he has quit-
ted the possession, or the tenants have attorned to the
plaintiff, so as he be in possession, and the defendant out ;
for if the plaintiff gets judgment in this last ejectment, and
the first judgment is affirmed, then he renders * it needless
and ineffectual by this riding judgment, upon which he
takes out execution to recover his possession. The rule for
judgment against the casual ejector is in the power of the
Court upon what terms the Court thinks fit. My lady
must shew us a different title, or we will not grant the
rule.

The same thing was done in another cause, *Hil. 2 Ann.*
B. R. where the defendant in ejectment, pending a writ
of error, delivered a new declaration in ejectment, and the
Court was moved that the costs might be first paid. The
Court thought the payment of costs suspended by the writ
of error, but stayed all things for the reasons before given.

13. *Little versus Heaton.*

[March 26, 1702. *Ad Affisas coram Holt, C. J. 2 Ld. Raym.*
750. S. C.]

In ejectment on
a condition of
re entry, proof
of actual entry
and ouster, is
not necessary.
Holt 264. S. C.

EJECTMENT was brought by the lessor against
the lessee on a condition of re-entry for non-payment
of rent, and upon a trial before *Holt, C. J. Broderick* urged,
that an actual entry and ouster was necessary. *Holt, C. J.*
answered, that true it was the law had been held so, and
accordingly it was practised till the case of *Wibbers versus*
Gibson, 25 *Car. 2.*, vide 3 *Keb.* 218.; in which case *Hale*,
C. J. ruled the law to be otherwise upon a trial before him
at the assizes in *Bucks*, and held that the confession of
lease, entry, and ouster was sufficient: That, upon this
opinion of his, a case was made and moved in court, where
all the judges concurred with him: That accordingly it
was held by *Scroggs, C. J.* in the case of *Sir Robert Pye*
versus Billing, 1 *Vent.* 332. But that notwithstanding
this it became a question again after the Revolution, and
that he himself doubting about it, it was moved again in
court, and that his brothers were all of opinion with *Hale*,
and that accordingly he had ever since held it; and so it
was ruled in this case. 3 *Keb.* 282. †

1 Sid. 223. Vide
ante 246.
1 Saund. 319.

† But the de-
mand of the mo-
ney for the rent
must be proved,
notwithstanding
the confession of
the entry. 2 Ld.
Raym. 750,
751.

N. B. Suppose an entry is requisite to complete the title
of the lessor of a plaintiff. I take it that entry is not con-
fessed by the general rule, but only the entry of the nomi-
nal plaintiff; and therefore in such a case the plaintiff must
prove an actual entry by his lessor. And *Hale*, in 1 *Vent.*
248., seems to hint so. For the rule only confesses that the
lessor of the plaintiff made a lease, but not that he had a
power

power so to do. He confesses the lessor made such a lease, that the plaintiff entered, and the defendant ejected him; but how does this relate to the lessor's entry? (a)

(a) By stat. 4 G. 2. c. 28. a formal demand or re-entry is rendered unnecessary, upon a condition of re-entry for nonpayment of rent. In *Doug.* 485. it is laid down as settled by the opinion of all the Judges, upon deliberation and consideration of all the cases, that actual entry is only necessary to avoid a fine. The reporter makes a *quære* if it is not necessary to prevent the operation of the statute of limitations, and refers to *Ford v. Grey*, *post* 285. *Vide Bur.* 1897.

14. *Turner versus Barnaby.*

[*Trin.* 2 Ann. B. R.]

IN *ejectment*, if at the trial the defendant will not appear, and confess lease, entry, and ouster, the course is to call the defendant and his attorney, if he be within the rule; and then to call the plaintiff himself and nonsuit him; and then upon the return of the *posse*, judgment will be given against the casual ejector. * Also the master will tax costs upon the rule for confessing lease, entry, and ouster, and, if these be demanded of the defendant, and not paid, the Court upon affidavit will grant an attachment. Proceeding against the defendant, if he does not confess lease, entry, and ouster. *Mod. Cases, &c.* 225. S. C. *Post* 566, 649. *Cases B. R.* 564. *Holt* 266, 703. * [260]

15. Anonymous.

[*Pal.* 4 Ann. B. R.]

THE plaintiff in *ejectment* is a mere nominal person, and trustee for the lessor, and if he release the action, or if an action be brought in his name for the mean profits, and he release it, he has been committed for contempt: *Per Holt, C. J.* (b) Release of plaintiff is a contempt. 2 *Bur.* 665.

(b) To assign the death of the nominal plaintiff for error is a contempt. *Moore v. Goodright, Str.* 899.

In *Astin v. Parkin*, 2 *Bur.* 667. the following description of the nature of this action was given from the unanimous opinion of all the Judges:

The nominal plaintiff and casual ejector are judicially to be considered as the *fictional* form of an action really brought by the lessor of the plaintiff against the tenant in possession, invented under the control and power

of the Court for the advancement of justice in many respects, and to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side.

The lessor of the plaintiff, and the tenant in possession, are, substantially and in truth, the parties, and the only parties to the suit. The tenant in possession must be duly served; and, if he is not, he has a right to set aside the judgment. If, after he is duly served, he does not appear, but lets judgment go

by default, such judgment is carried into execution against him by a writ of possession.

There is no distinction between a judgment in ejectment upon a *verdict* and a judgment by *default*. In the first case, the right of the plaintiff is tried and determined against the defendant; in the last case it is *confessed*.

An action for the *mesne profits* is consequential to the recovery in ejectment. It may be brought by the *lessor* of the plaintiff in his own name, or in the name of the *nominal lessee*; and in either shape, it is equally *his* action.

The tenant is *concluded* by the judgment, and cannot controvert the *title*. Consequently he cannot controvert the plaintiff's *possession*; because his possession is *part* of his title: for the plaintiff, to entitle himself to recover in an ejectment, must shew a possessory right not barred by the statute of limitations.

This judgment, like all others, only concludes the parties as to the *subject matter* of it. Therefore, beyond the time laid in the demise, it proves nothing at all; because beyond that time the plaintiff has alleged no title, nor could he put to prove any.

As to the *length of time the tenant has occupied*, the judgment proves nothing, nor as to the *value*; and therefore it must be proved in all cases *how long* the defendant enjoyed the premises, and what the *value* was; and that the time of such occupation by the defendant was *within* the time laid in the demise. *Vide alio* 1 *Bur.* 623. 3 *Bl. Com.* 206. 1 *Term Rep.* 758. 2 *T. R.* 684. Ejectments are under the control of the Court, and may be managed by them to answer every purpose of justice and convenience. *Fairclaim v. Shamtitle*, 3 *Bur.* 1290. *Ree v. Lee*, 2 *Bl.* 940.

Entry Forcible.

1. The King *versus* Harris:

[*Paf.* 11 *Will.* 3. *B. R.* 1 *Ld. Raym.* 440. *S. C. Comyns* 61. *S. C.*]

Carth. 496. Inquisition removed into *B. R.* no restitution can be if defendant traverse or plead three years possession. *Far.* 138. 1 *Vent.* 265. 3 *Salk.* 170. *Comb.* 328. *Holt* 324. *S. C.* 3 *Salk.* 313. 5 *Mod.* 443. *Cases B. R.* 268.

IF an inquisition of *forcible entry* comes into this court by *certiorari*, there can be no restitution, if either the defendant traverses the force, or pleads three years quiet possession before the force; for these must be tried first. And *Holt*, C. J. remembered the case of Sir *Robert Atkins* and the Lord *Brounker*, concerning St. *Catherine's* hospital; there an indictment of forcible entry was brought into *B. R.* *per certiorari*, and my Lord *Brounker* pleaded that the late master (*Mountague*) and brethren of the hospital were seised in fee in right of the hospital, and so continues it to himself, and that he, &c. had been in quiet possession for

for three years next before the force; to which plea it was never replied. *Per Holt, C. J.* upon the motion of Sir *Will. Williams.*

Comb. Dig.
Forcible Entry,
D. 7. vol. 4. p. 2.
211. 3d edit.

2. The King *versus* Dorny.

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 610. S. C.]

AN inquisition of a *forcible entry* was, That the defendant & *al.* in *messuagium existens* a school-house *ad tunc existens. tenement. J. S. intraverunt & eum disseisit. expuls. & eject. extratenuerunt.* Mr. *Thompson* objected, that it does not appear what estate *J. S.* had, so that he might be but tenant at will, which is not within any of the statutes. Mr. *Lechmere contra*: * *Disseisit.* imports that he had a freehold. *Vide* 3 *Leon.* 102. *Palm.* 277. *All.* 49. *Sed per Holt, C. J.* Here is an entry upon *J. S.*, but no expulsion expressly alleged; and the disseisin ought to be positively charged; the words *being expelled and disseised they held him out*, are a conclusion without premises. *Vide* 1 *Sid.* 102. *Possessionat.* is ill. 1 *Ven.* 306. *Disseisivit* is ill; cited by Mr. *Thompson.* The inquisition was quashed *per Cur.*

Tenant at will is not within the statute. Expulsion must be expressly alleged. *F. N. B.* 248. C. 5 Mod. 321, 447. *Far.* 123, 115, 138. *Holt* 267. S. C. Cases *B. R.* 417. *Caf.* ant. 115. *Caf.* ant. 116. *Poph.* 205. 6 Mod. 95. 1 *Hawk.* 94. 2 *Hawk.* 293. 3 *Salk.* 169. *Comber.* 70. *Caf.* ant. 123.

* [261]

Error.

1. Howard *versus* Pitt.

[Trin. 4 W. & M. B. R.]

TRESPASS against four defendants; the plaintiff recovered in *B. R.* Error was afterwards brought in *Cam. Scacc.*, where it pended a year, and then abated by the death of one of the plaintiffs in error; then another writ was brought, which pended half a year, and abated by the death of another plaintiff. The plaintiff in the original action, seeing no new writ of error brought a third time, and thinking himself at liberty, sued out execution by *ca. sa.* against the survivors. Serjeant *Levinz*

Carth. 236. Where writ of error abates in *Cam. Scacc.* the judgment is not in *B. R.* without a remittitur. *Yelv.* 7. *Ro.* 899. *Show.* 402, 422. 15 H. 7. 16. b. 3 *Cro.* 891. *Holt* 1.

Y 4

moved

Cro. El. 364,
416, 706. Lane
20. Godo. 372.
2 Bur. 660.

moved for a *superfedeas* to this *ca. fa.* *Et per Cur.* It was agreed, 1st, That there was no need of a *scire facias* to revive the judgment against the survivors, but that was sufficiently revived by the several writs of error. 2dly, Where a writ of error determines in the Exchequer-chamber by abatement or discontinuance, the judgment is not again in *B. R.* till there be a *remittitur* entered, for without such *remittitur* it cannot appear to the Court of King's Bench, but that the writ of error is still pending in *Cam. Seacc.* 3dly, That the execution was erroneous for this cause, but not void; and 4 *Leon.* 197. was denied,

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2. Parker *versus* Harris,

[Mich. 4 W. & M. B. R. Intr. Trin. 3 Rot. 27.]

Where the plain-
tiff brings error,
and the Court
reverte, they give
a new judgment;
otherwise if the
defendant brings
error. Post 401,
403. 11 Rep.
42. Moor 283.
Far. 3. Comb.
314. 1 Saund.
180. 2 Saund.
256. S. C.
2 Vent. 249,
253, 270.
4 Mod. 76.
Carth. 234.
Skin. 307. Holt
441. Case ant.
2, 3.

DEBT for rent in *C. B.* upon two several demises, one of which was, *reddendum* after the rate of 18*l.* *per annum.* After judgment for the plaintiff, the defendant brought a writ of error in *B. R.* The Court held, that *reddendum* after the rate, &c. was void for the uncertainty, and for this it was held the judgment should be reversed: Then it was a question what judgment the Court should give, Whether, as the Court below should have given, *viz.* judgment for part, and a *nil capiat* for the rest, or a bare reversal? *Et per Cur.* Where judgment is given for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment, for the suit is only to be eased and discharged of that judgment: But where the plaintiff brings error, the judgment shall not only be a reversal, but the Court shall also give such judgment as the Court below should have given; for his writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein erroneous judgment was given (*a*).

(*a*) *Vide* 4 Bur. 2156, 2490.3. Lampton *versus* Collingwood,

[Trin. 6 W. & M. B. R. Rot. 419. 1 Ld. Raym. 27. S. C.]

Matter contrary
to the surmise of
the *sci. fac.* and
pleadable there-
to, not assignable
for error.
4 Mod 314.
S. C. Comb.

JUDGMENT was given against *A.* and *B.*, and a *scire facias* taken out against *R.* administrator of *B.*, and two *nibils* returned, and thereupon execution awarded; and the *scire facias* suggested the recovery to be against *A.* and *B.*, and that *A.* died and *B.* survived, and afterwards *B.* died intestate, and that *R.* is his administrator.

Now

Now *R.* brought a writ of error *coram nobis* for error in the execution, and assigned for error, that *A.* survived, and hereupon issue was joined, and found for the plaintiff; but the Court notwithstanding quashed the writ of error, holding this matter not a matter assignable for error, because it is contrary to the surmise of the writ of *scire facias*; and if a *scire feci* had been returned, he might have pleaded it, and since it was not, he must bring his *audita querela* (a).

325. Carth.
282. 3 Salk.
145. Holt 278.
1 Lev. 76, 310.
2 Cro. 28, 344.

(a) An *audita querela* was brought accordingly, and relief given thereon. 3 Ld. Raym. 327. *Vide Str.* 197, 1075. Bl. 1183.
Note to S. C. in Ld. Raym. 4th edit.

4. Hartop *versus* Holt.

[263]

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 97. S. C.]

IN *debt* brought in *B. R.* the plaintiff had judgment. The defendant brought a writ of error in the Exchequer-chamber, and the judgment was affirmed. The plaintiff sued out a *scire facias* in *B. R.*, and had an award of execution. Hereupon the defendant brought error in the Exchequer-chamber *tam in redditione judicii quam in adjudicatione executionis*. Notwithstanding all this, the plaintiff in the original action went on and sued out execution, and now a motion was made to set it aside, because it was sued out when there was a writ of error depending. *Et per Holt, C. J.*

5 Mod. 228.
S. C. Writ of error lies not in Cam. Scacc. on 27 Eliz. on an award of execution after the original judgment affirmed there. Comb. 393. Holt 271. Cases B. R. 105.

1st, The intent of the statute 27 *Eliz.* was only to relieve upon the very merits of the cause, as it stood upon the judgment, which the justices and barons might either affirm or reverse; but there can be no new writ of error after they have affirmed or reversed. If this *scire facias* had been sued out, and there had been no writ of error, then upon the award of execution a writ of error would have lain in *Cam. Scacc.*, for then the merits of the first judgment had remained yet to be examined: But in the principal case the merits of the first judgment were examined before the *scire facias*, and thereby the Exchequer-chamber have executed their power and authority. If a plaintiff in error be nonsuit, he shall not have a writ of error again. In the case of *Exeter College*, the Lords reversed the judgment of this Court, and sent their judgment down to be entered here; but this Court refused it, because the authority of the judges here determined with the first judgment, and they had no more to do with it.

1 Vent. 38.
2 Cro. 171.
Hob. 72. 1 Vent.
169. 5 Mod.
229. 2 Keb.
849. 1 Mod. 79.

2dly, They held *ex consequenti* that the writ of error could be

Post 403.

Mod. Cases 30.
Post 321.

be no *superfedeas* to the execution, and that what the plaintiff did was well, and no contempt (a).

(a) *Vide Strange* 949, 1102. *Andr.* 287. *Doug.* 350.

5. *Groenvelt versus Burwell.*

[*Trin.* 10 *Will.* 3. *B. R.* *Vide* this case, *title Courts and Jurisdictions.* *Ld. Raym.* 213. *S. C.* but not *S. P.* *Comyns* 76. *S. C.*]

Ante 144, 200.
Post 396. Error
lies to a new
created jurisdic-
tion of record,
acting by the
course of com-
mon law. *Co.*
Lit. 288. b.
1 *Vent.* 33.
2 *Jon.* 16.
4 *Co.* 21. b.
Ow. 63. 3 *Salk.*

IT was held in this case *per Holt, C. J.* that wherever a new jurisdiction is erected by act of parliament, and the Court or Judge that exercises this jurisdiction acts as a court or judge of record according to the course of the common law, a writ of error lies on their judgments; but where they act in a summary method, or in a new course different from the common law, there a writ of error lies not, but a *certiorari*.

265. *S. C.* *Carth.* 421, 491. *Cases B. R.* 245, 386. *Holt* 184, 395, 536.

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6. *Wicket & al. versus Creamer.*

[*Pal.* 11 *Will.* 3. *B. R.* 1 *Ld. Raym.* 439. *S. C.*]

Writ of error
abates not by the
death of defend-
ant in error.
Cases B. R. 240.
S. C. *Holt* 274.

MR. *Northey* and Mr. *Eyre* moved to set aside an execution, and the case was, that a writ of error was brought on a judgment recovered in this court by *A.* and *B.*, and the writ of error was allowed, but no transcript made. *B.* died; the other defendant in error sued a *scire facias quare executionem non*; and, upon two *nibils* returned, had an award of execution, and thereupon took the plaintiff in error upon a *ca. sa.*

Vide 1 *Lill.* 531.

It was argued and admitted, that though there be but one defendant in error, yet the writ of error does not abate by his death; but there must go a *scire facias ad audiend. error.* against his executors. But that the defendant in error was irregular in this case, because the record was not transcribed, and that, as it happened here, by his own fault. Sir *Bartholomew Shower* on the other side said, as to the first point, that the plaintiff in error should have shewed the death of one of the defendants by pleading to the *scire facias*, but had slipped his time, and ought not to have advantage of this matter without *audita querela*. Upon which it was held *per Holt, C. J.*

After award of
execution on a
sci. feci, defend-

That where the defendant had matter which he might have pleaded to the *scire facias*, and has lost the benefit of that

that by an award of execution upon a *saire feci* returned, he is estopped for ever, and can never have an opportunity or means to let himself in to take advantage of that matter. But where it is an award on two *nihilis* returned, he may relieve himself by *audita querela*, and the Court will save him that trouble, and relieve him upon motion, unless the ground of his *audita querela* be a release, or some such matter of fact, as may be proper to be tried: And the execution was set aside.

ant cannot have advantage of matter pleadable to that; otherwise after two *nihilis*. Ante 93. Audit. Quer. Br. Audita Querela 12. Fitz. 25. Gouldsb. 171. 2 Leon. 194.

7. Anonymous.

[Pasch. 11 Will. 3. B. R.]

PER Holt, C. J. A writ of error may be against the king without petition, though anciently that was used, and was a decency; but, since 1640, writs of error have been made out *ex officio*.

Writ of error against the king. 2 Leon. 194. Vide Eq. Ca. Ab. 414.

8. Gigger's Case.

[Pasch. 1 Ann. B. R.]

ACTION was brought by the name of *Gigger*, and now a writ of error was brought as in an action between *Giggure* and the defendant, whereas his surname was *Gigger*; and it was moved that the defendant, notwithstanding the writ* of error, might take out execution; and the Court held this was a fatal variance (a), and that the record was not removed by the writ of error, but would not meddle as to the execution. *Et per Holt, C. J.* Where a writ of error abates by motion, the defendant in error must move for leave to take out execution; but where by reason of variance the record is not removed, he need not move the Court for execution: But at last the record was amended.

Error abates by motion; Court must be moved for execution; otherwise if for variance. Holt 273. S. C.

* [265]

(a) On *nul tiel record*, *Segrave* for *Seagrave*, held no variance *quia idem sonat*, *Williams v. Ogle*, Str. 889. *Vide Stat. 5 Geo. 1. c. 13.* by which it is en-

acted, that all writs of error, wherein there shall be any variance from the original record, or other defect, may be amended.

9. *Andrews versus Lynton.*

[Pal. 2 Ann. B. R. 2 Ld. Raym. 884. S. C.]

Original returned by one not sheriff, is not assignable for error. Cro. Jac. 359, 597. 1 Rob. Rep. 53. 1 Sid. 94. 1 Keb. 353, 388. Irregularity in the return must be complained of the same term. Holt 273. S. C. Com. Dig. Plead. 3 B. 16.

ERROR of a judgment by default in an action of trespass in *C. B.*, the error assigned was, That the person who returned the original was not sheriff: And Mr. *Raymond* urged, that the returning was not a ministerial act, and that an averment lies against what the sheriff does as an officer, but not as a judge. *Vide Yelv.* 34. 2 Cro. 12. 7 H. 7. 4. 8 H. 4. 15. 1 Cro. 421. 1 Ra. 758, 760. 2 Lev. 184, 242. 2 Jo. 125. *Et per Holt, C. J.* 1st, If the sheriff did not return the writ, it was irregular, and you should have complained; but that should have been in time: When a writ comes in, the defendant has all the term to complain of irregularity, and in that time the sheriff might have had leave in *C. B.* to disavow the return; but after the term is slipped, and the writ is filed and becomes a record, it is then too late, and every one is estopped to say the sheriff did not return it. But, 2dly, The defendant in the principal case admitted the original by appearing and not challenging the original; as if a *venire* be returned by one that is not sheriff, this is not assignable for error; because he might have challenged the array for it at *nisi prius*.

10. *Gibbons versus Roberts.*

[Mich. 2 Ann. B. R.]

Court may be held per legem mercatorum, and not a court of staple. 2 Ld. Raym. 819. Mod. Ca. 61.

ERROR of a judgment in *Bristol* in an action of debt upon a bond. 1st, It was objected, That the style of the Court is laid to be *secundum legem mercatorum*, which cannot be but in a court of staple; and debt upon a bond is not *infra legem mercatorum*. *Et per Cur.* We will intend this to be another sort of customary court under that name; as where a court of pie-powder was said to be held by prescription, which could not be; this Court held it to be a customary court under that denomination. 2dly, It was objected, That here was a *dies datus partibus predictis*, and it was not alleged to be *per Curiam datus*. *Sed per Holt, C. J.* Where an award of process or judgment is alleged, it must be said *per Cur.*, but a *dies datus* need not; for though it may be *prece partium*, yet it must be given by the Court. 3dly, It was objected, That the *certiorari* was awarded to the sheriff of the county of *Bristol*, and the return is by the sheriff of

Riobal

Bristol. Sed non allocatur; For we take notice of all counties, being to award process to them every day, and the sheriff is our officer. 4thly, It was objected, That the return was by a succeeding sheriff, and not by him to whom the writ was directed. *Sed non allocatur*; for the writ is to the sheriff as sheriff, and not to him by this or that name; and therefore different from a writ of error to the Chief Justice of the Common Pleas.

11. *Hale versus Clare.*

[Paſ. 3 Ann. B. R.]

IN a borough-court a plaint was entered as the plaint of *A. B.*, and the declaration was by *A. B.*, executor of *J. S.*, and on a writ of error in *B. R.* this variance was assigned for error: And the Court held, 1st, That want of a plaint in an inferior court is the same as want of original in the court of Common Pleas; and that this could not be a plaint in this action; and though a verdict will cure want of original, yet there is no verdict in this case. 2dly, If such variance had been in a record of the Common Pleas, diminution might have been alleged, and a good writ certified; but in records out of inferior courts, no diminution can be alleged, and the Court must take them as they find them (*a*). *Vide* 1 *Ven.* 6. 2 *Cro.* 108, 109. *Jo.* 304. 1 *Cro.* 282. *Hob.* 130, 134, 264, 282.

6 Mod. 149. S.C. Variance between plaint and declaration in inferior court is error. *Far.* 103. No diminution can be alleged of records out of inferior courts. But this rule extends not to Wales. 1 Sid. 147, 164, 40. *Vide* Godb. 267.

(*a*) *R. acc. Rep. B. R. Temp. Hard.* *mandum conscientiam*, 2 *Crompt. Prac.* 367. But the Court may, if they see occasion, award a *certiorari ad infor-*

12. *Regina versus Foxby.*

[Trin. 3 Ann. B. R.]

THE defendant was convicted at the sessions for a scold, and adjudged to be ducked. She brought a writ of error, (by leave of the attorney-general,) and the Chief Justice said, the Court was well enough possessed of the cause by writ of error, but the best way was by *certiorari* to remove it into the crown-office, and then bring a writ of error *coram nobis residens*; and upon that the course is to give a rule to assign error, and then to move for a peremptory rule, and in default thereof to have a *non prof.*, and then an award of execution.

6 Mod. 11. S.C. 178, 213, 239. The proper way to remove indictments. *Mod. Cases* 11. 1 *Vent.* 53. *Holt* 274.

13. *Burnaby versus Saunderfon.*

[Trin. 3 Ann. B. R.]

Mod. Cases 174.
Defendant in
error may sue out
a second certiorari
after a variant
original returned on the
first.

* [267]

Rep. B. R.
Temp. Hard.
19. 2 Cro. Car.
130. Str. 440.
Lord Raym.
1476.

3 Leon. 106,
107.

ERROR was brought on a judgment in *C. B.*, and want of an original assigned for error. The defendant in error came in *gratis*, and alleged diminution, and prayed a *certiorari*, and thereupon a variant original was certified. Upon this he came again at the day given, and suggested another original of such a term, * and prayed another *certiorari*. This appearing on the master's report, the question was, Whether it was regular? *Et per Holt, C. J.* If a record below be of Easter-term, and want of original be assigned for error, the defendant may allege diminution, and then a *certiorari* goes to the *custos brevium* only, to certify an original of Easter-term, that being the term of which the *placita* is: If then the *custos brevium* certifies a wrong original, or that there is no original, then the defendant may come and suggest, before *in nullo est erratum* pleaded, that there is an original of another term, viz. *Hilary* or *Michaelmas*, and then there must go a *certiorari* to the *custos brevium* to certify that, and another to the Chief Justice of the Common Pleas to certify the continuances. Also if the *custos brevium* certify a wrong original of the same term the *placita* is of, it has been held the defendant may suggest there is a right original even of that very term; and when both are before the Court, the Court will apply the record to that which is a good original. 2 Cro. 279.

14. *Smith versus Stoneard.*

[2 Ld. Raym. 1156. S. C.]

Where want of
original is assigned,
the plaintiff
in error must
sue a *certiorari*,
unless the defendant
confesses
it. Holt 274.
S. C.

IN a writ of error of a judgment in *C. B.* after verdict, the plaintiff in error assigned for error the want of an original, but did not take out a *certiorari*, as the course is; the defendant in error pleaded *in nullo est erratum*; and when the cause came on in the paper, it was objected, That there ought to have been a *certiorari* taken out, and a return of the want of an original upon that; for there might be an ill original, which is not aided by verdict, though want of original is. *Et per Holt, C. J.* If want of an original be assigned for error, and the plaintiff in error does not sue out a *certiorari*, the course is for the defendant in error to go to the master of the office, and get a rule for the plaintiff in error to return his *certiorari*; and
in

in case he does not get it done accordingly, the assignment of errors signifies nothing; but if the defendant in error will come *gratis* and confess the error, there need be no *certiorari* returned; and as to the objection, That there may be a bad original in this case, that is another kind of error; for when want of original is assigned for error, the Court will never intend a bad original. The judgment was affirmed.

Vide 1 Barn. B. R. 259.

15. Carlton *versus* Mortagh.

[268]

[Trin. 3 Ann. B. R. 2 Ld. Raym. 1005. S. C.]

A *Writ of error* was brought upon a judgment in debt in C. B., and want of original was assigned for error. The defendant, before a *certiorari* returned, came in *gratis*, and pleaded a release in bar; the plaintiff in error demurred, and the defendant joined therein. It was agreed *per tot. Curiam*, that the release was mispleaded for want of a *venue*; and upon this the question was, Whether the Court, *ex officio*, should award a *certiorari*, that it might appear to them whether there were an original or not? *Holt*, C. J. was of opinion that the Court could not award a *certiorari*; because the question was not, Whether error or not? but whether barred or not by the release? And that want of original was certainly error in this case, which the defendant had confessed by coming in *gratis* and pleading his release; for that by coming in *gratis* he had prevented the plaintiff, and hindered him from completing his error by taking out a *certiorari*; and therefore the Court must take it to be as the plaintiff had admitted: Also that the Court is not at liberty to depart from the point referred to their judgment: At that rate they strike out the plea in bar and the demurrer, and give judgment on the *certiorari*: That the Court is no more at liberty in this case, than if, instead of a demurrer, issue had been joined upon this plea, and found for the plaintiff; and if that had been the case, the Court might as well have granted a *certiorari* to see whether the trial was to any purpose: But he allowed a diversity between a particular error, as in this case, and the general errors assigned; for if the defendant had pleaded a release, and that had been found against him; yet the Court could not reverse the judgment, unless error had appeared in the record. *Ceteri iudicarii contra*; *Powys* and *Gould* held, that the act of the parties might foreclose themselves, but not the Court; and that they are to give judgment upon the whole record according to conscience and right, and cannot be concluded by any admittance of the parties. And *Powell* took this difference,

6 Mod. 113, 206. Want of original assigned and a release mispleaded. The Court may award a *certiorari* ad inform. conscientiam. Mod. Cases 208. Hob. 164. Keb. 225. 1 Cro. 84. Moor 700. Noy 83, 84. 1 Sid. 39. Lat. 152. 3 Salk. 399. S. C. *Holt* 275. Court cannot depart from the point put in judgment. 2 Keb. 17. 1 Cro. 84. 2 Lev. 234. Hob. 54. Far. 104. Mod. Cases 113, 114, 206, 235. Rep. B. R. Temp. Hard. 118.

Vide Cunningham v. Houston, Str. 127.

If

2 Cro. 443.
Godh. 407.

Error in fact may
be confessed, but
not error in law.
Wilkes's case,
4 Bur. 2551. ac.

[269]

1 Roll. 754.
Noy 83, 84.
1 Leon. 22.
1 Co. 36. 5 Co.
37. 1 Sid. 109.
Yelv. 118.

If error be assigned in a defect which will appear by the record itself, and the defendant pleads a release, the Court ought not to reverse the judgment though the release be mispleaded; because it is an error in law, which appears upon the face of the record, and the release was to bar the writ of error. *Aliter* if the error does not appear upon the record; for in such case the Court must go on to determine the writ, and whether there be error in the record or not: And he held that error in fact might be confessed; but error in law could not; by errors in fact he meant such errors as could not appear on the face of the record; and therefore if a matter *in pais* be assigned for error, and the defendant plead a release, but misplead it; or if issue be taken and found against him, the Court in such case must reverse the judgment without more ado. *Vide* 21 E. 3. 54. 1 Cro. 415. *Jo.* 373, 374. 1 Ro. 764, 765. 2 Cro. 60. *Lat.* 152. 1 *Jo.* 139, 140. 5 Co. 37. After *in nullo est erratum* pleaded, the plaintiff cannot have a *certiorari ex debito justitie*, but it may be granted *ad informand. conscientiam Cur.* 28 H. 6. 10. 9 E. 4. 32. The Court will award it in order to affirm, but never to reverse a judgment or make error. *Palm.* 52. *Jo.* 138. 21 E. 4. 38, 39, 44. 2 Cro. 6, 141, 445. 3 Cro. 836, 837.

16. Tyson *versus* Hilliard.

[Hill. 3 Ann. B. R. 2 Ld. Raym. 1122. S. C.]

Continuances
cannot be returned
upon the same
certiorari with
the original.
Holt 276. S. C.

IN *error* of a judgment in C. B. the declaration was *Trin. primo Anna*, and want of an original assigned for error, and a *certiorari* was awarded, and the original returned with the continuances, by which it appeared the declaration was *Hill. 13 W. 3.* with imparlances till *Trin. 1 Ann.*, and the original of that term; so that it appeared to be a suit pending in the Common Pleas before any original, which was the objection. *Vide* 1 Lev. 69. 1 *Keb.* 177, 197, 238, 377. *Yelv.* 108. *Sed non allocatur*; for *per Holt, C. J.* The *certiorari* as to the continuances was impertinent, and so is the matter returned; and as to the rest the return is impossible and contrary to the record, and therefore the imparlances shall be taken to be in another cause. *Vide Style* 293. Judgment affirmed (a).

Vide 1 Rol. Abr.
764.

(a) *Vide* 1 *Wils.* 181. *Dyke v. Sweeting.*

17. Redham *versus* Waters.

[Hill. 4 Ann. B. R.]

UPON a writ of error of a judgment in the Court of *Berwick*, the proceedings were returned in *English*. *Et per Cur.* it was held, that on a writ of error the Court of King's Bench is to take notice of the particular laws and customs of the place where the judgment was given, and the law of that place need not be returned, but the Court must inform themselves of it; also, that if by law the proceedings below be in *English*, they may be so entered here; and a difference was taken between a writ of error and a *habeas corpus*, for upon a *habeas corpus* the inferior jurisdiction must in their return set forth the particular law or custom of the place whereby they justify their commitment, otherwise the Court is not to take notice of it.

Upon a writ of error the Court takes notice of the law or custom of the inferior jurisdiction; otherwise on a *habeas corpus*. 2 *Ld. Raym.* 1220.

18. Meredith *versus* Davies.

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[Pas. 10 Ann. B. R.]

ERROR of a judgment for the plaintiff in ejectment in the grand session of *Wales* after verdict; the general errors were assigned, and *in nullo est erratum* pleaded. Upon arguing of the case it appeared that the declaration set forth a demise for a term of years to the plaintiff, but did not shew that the plaintiff entered or was possessed; and the truth was, that this line was omitted in the transcript, and the Court held this defect to be fatal. Hereupon the plaintiff prayed the Court would *ad Informand. conscientiam* award a *certiorari* to the *grand sessions*. Mr. *Brydges* argued it could not be done, for that the party had estopped himself by pleading *in nullo est erratum*; and though the Court might do it in order to be certified of the out-branches of the record, as in the original writ or warrant of attorney, which are not returned with the body of the record upon a writ of error, and which indeed are contained in another roll; yet the Court could never do it to be certified of any thing in the body of the record: They must suppose it to be returned as it ought to be, and must take it as it is, and are concluded by the admission of the parties from taking it to be otherwise. *Vide* 1 *Ro.* 264: 2 *Cro.* 6. 9 *E.* 4. 32.

Court may award *certiorari ex officio* to supply a defect in the body of the record after in *nullo est erratum* pleaded. 1 *Ro. Ab.* 767. *M.* 1. 5 *Co.* 37. b. 2 *Roll. Rep.* 471. *Still.* 352.

On the other side it was argued, that by *in nullo est erratum* the defendant admitted the record perfect; for the effect of his plea is that this record, as it is, is without

By pleading in *nullo est erratum*, the defendant admits the

record to be perfect, and cannot afterwards allege diminution.

Far. 104, 124.
2 Saund. 212,
&c. 1 Lev. 239.
2 Lev. 38, 239,
299. 1 Mod.
47, &c. 1 Sid.
199. Moor 700.
2 Cro. 141.

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6 Mod. 210.
1 Sid. 139.

Ante 208.
3 Mod. 290.

Rep. B. R.
Temp. Hard.
118. Show. 214.
Str. 907.

error; therefore he cannot come and allege diminution afresh, and say that there is error by reason of such a defect, for that is against his former supposal; and by the same reason he may be let in to allege a diminution more than once, and he may allege it *in infinitum*; that the party was therefore bound and foreclosed by this admission, and that equally as to all parts of the record; but the Court were not foreclosed, for the writ of error is a commission to them to examine the errors, viz. *quod inspectis record. & processu fieri faciat quod de jure fuerit faciend.* Therefore no admission of the parties can or ought to restrain the Court from looking into the record before them. That in the case of *Carlton and Mortagh* (*ante pla. 15.*) the plaintiff assigned for error want of original, and the defendant pleaded a release, but mispleaded it; and though this was a full confession of the party that there was no original, yet the Court awarded a *certiorari*, and affirmed the judgment; but that had been otherwise if he had assigned for error infancy; because this could not appear by inspecting that record: And that wherever, by inspecting the record, the Court may affirm the judgment, they ought to award a *certiorari*. And as the party by pleading *in nullo est erratum* is estopped to pray a *certiorari* as to every part of the record, so the Court is foreclosed as to no part; and the case of *Gwin* was cited. 1 *Keb.* 557. In a *quod ei deforceat* judgment was given, *quod petens teneat predicta tenementa* instead of *recuperet*: Upon this a writ of error was brought, and after *in nullo est erratum* pleaded, the Court, being informed the judgment was right, sent a *certiorari*. In the case of *Fanshawe and Morrison*, *Tren.* 3 *Ann. B. R.* in a *scire facias* on a recognizance against bail, judgment was for the plaintiff, & *quod recuperet damna occasione dilationis executionis*; which was naught, being not warranted by the statute, which gives only costs of suit; *in nullo est erratum* was pleaded, and the defendant got this amended in the Common Pleas, and the Court suffered it to be amended here. *Et per Cur.* a rule was made for a *certiorari* upon these reasons, together with an affidavit that the record was right below.

Escape.

1. Scott *versus* Peacock.

[Mich. 4 W. & M. B. R.]

TO a *scire facias quare executionem non* upon a judgment, the defendant pleaded that he was formerly taken in execution by *ca. sa.* upon the same judgment, and the sheriff suffered him to escape, to which escape the plaintiff then and there consented: *Sed non allocatur*; for the assent subsequent will not make it an escape with the consent of the plaintiff, and therefore he has either his remedy against the sheriff, or may retake the party.

Precedent assent of the plaintiff will excuse escape, but not subsequent. 3 Danv. 118. p. 14. S. C. Dyer 275. and cases in marg. 2 Will. 294. Sid. 330.

2. Dominus Rex *versus* Fell.

[272]

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 424. S. C.]

FELL was indicted by two several indictments, viz. one, for that he being keeper of *Newgate*, one *Birkenhead* was committed to the prison of *Newgate sub custodia vicecom. Midd.*; and the said *Birkenhead* being in custody of *Fell*, *oneratus alta proditione*, the defendant negligently suffered him to escape. And it was objected in arrest of judgment, that the warrant of commitment ought to have been set forth; which was not done; and it was argued by Mr. *Northey*, that even in debt for escape the commitment must be set out, 3 *Cro.* 894. 2 *Inst.* 590., and he might be charged with high treason, and not committed for it; and at the time of the escape he does not appear to have continued charged, nor is it said that the defendant let him escape *sine warrantis* or *pardonatione*. *Et per Holt*, Chief Justice: 1st, It is not enough to say that he was charged, but he must also be said to be committed for high treason; for if *H.* be in custody for trespass, and another should go before a justice and swear high treason against him, *H.* is in custody and also charged with high treason; yet the gaoler in that case is not liable, as he would have been in case *H.* had been committed for treason: The precedents are, *cujus causa commissus fuit*; and the warrant of commitment was set out in Lord *Grey's*

5 Mod. 414. Indictment against gaoler for negligent escape of H. committed to prison, and charged with high treason, *nil.* Holt 279. S. C. Cases B. R. 226, 227. 2 Hawk. c. 19. l. 144. 10 Vinet 124.

1 Rol. Abr. 809. F. 3. 2 Mod. 30. Dy. 66, 13. Cro. Jac. 588. pl. 11.

case; and if there be error in the warrant, the gaoler shall take no advantage.

Post 287.
1 Rol. Abr. 806.

2dly, The prisoner is in custody both of the gaoler and of the sheriff, and if he be committed to the sheriff, and the gaoler suffer him to escape, the gaoler is punishable; for the sheriff shall answer civilly for the faults of his gaoler, but not criminally (a). *Vide* 14 E. 3. c. 10. 19 H. 7. c. 10. And a commitment to a prison is frequent, *viz.* *Committitur prisonæ; committitur Turri London.*

3dly, The Court will not intend a pardon: If any were, it should be shewn on the other side; and if there were a pardon, the sheriff or officer cannot take notice of it till it be allowed in B. R.; and, before such allowance had, it is criminal in him to suffer such escape; but the judgment was arrested.

(a) The report in *Ld. Raymond* is *contra quoad hoc*. The liability of the sheriff to answer *civiliter*, but not *criminaliter*, for the acts of his bailiff, (to which those of his gaoler seem analogous,) is explained and defined in *Latch*. 187. *Saunderson v. Baker*, 3 *Wils.* 316. and *Woodgate v. Knatchbull*, 2 *T.R.* 148, 156. The sheriff shall not be

imprisoned or indicted for the acts of his bailiff, but an action lies against him by the party grieved for damages, and he shall be fined. So that he is not liable to any corporal punishment, but where it rests in damages he shall make the party a pecuniary satisfaction.

3. *Watson versus Sutton.*

[Mich. 13 Will. 3. B. R.]

Marshal not chargeable in escape, till notice of the commitment. Cases B. R. 583. S. C. *Vide* 1 *Ld. Ray.* 704.

* [273]

Cro. El. 743.
Mod. Cases 133.
Ante pl. 2.
New trial not granted for matter omitted to be insisted on at former trial. *Mod. Cases* 22, 222, 242. 2 *Salk.* 615. *Ante* 295.
2 *Sho.* 17. *Str.* 1226.

IN *debt* for an escape against the marshal of the King's Bench, and *nil debet* pleaded, the evidence was, that the prisoner being out on bail came and surrendered himself, by entering a *reddidit se* in discharge of his bail in the judge's book; that * the plaintiff's attorney accepted him in execution, and filed a *committitur* with Mr. Bromfield the proper officer. Upon this evidence the jury found for the plaintiff; and now the marshal moved for a new trial, because he had no notice, for it was not sufficient to enter a *committitur* in the office, without serving him with a rule, or entering a *committitur* also in the marshal's book kept in the office for that purpose, without which the marshal is not chargeable in escape. *Et per Cur.* A *reddidit se* in the judge's book is an immediate discharge of the bail; but he is not in custody till the plaintiff makes his election by entering a *committitur*; nor then is he in custody, so as to charge the marshal, till there be a notice by rule or entry as aforesaid: But this matter should have been shewed and insisted on at the trial; it is now too late: So the motion was denied.

4. Shirley *versus* Wright.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 775. S. C.]

THE sheriff had the defendant in custody on a *ca. sa.* which issued *post diem & annum*, without a *scire facias* (a), and let him escape; and it was held that he was liable, and should not take advantage of the error; but otherwise had it been on a *capias ad respondend.* bearing *teste in Trinity* term, and returnable in *Hilary* (b), because such process must be returnable from term to term; otherwise it is out of court.

Escape upon erroneous process. Far. 29. Ante 272, 30. 2 Salk. 700. S. C. 3 D. 121. p. 6. S. C. Holt 761. Cro. El. 188. Carth. 188.

(a) By the report in Ld. Raymond and 2 Salk. it appears that the objection was, that the *ca. sa.* bore *teste in Mich.* term, and was returnable in *Easter*. (b) A defendant arrested upon such process may bring an action of false imprisonment against the plaintiff. *Parsons v. Lloyd*, 2 Bl. 846. 3 Wils. 341.

5. Anonymous.

[Mich. 4 Ann. B. R.]

DEBT for 200 *l.* upon a bond, conditioned to pay 100 *l.*: for want of bail the defendant was committed to the *marshal*, and he applied to the justices of peace of *Surrey*, and procured a discharge on the late act, for the relief of insolvent debtors. The plaintiff obtained an escape-warrant, upon which he was taken up; and, upon a motion to be discharged, the Court held this was an escape, for being a prisoner both indebted and also charged in above 100 *l.* debt and damages, the justices had no authority for what they did, and therefore the discharge was illegal and void.

Discharge by Court not having jurisdiction, is void. Cro. El. 893. 1 Roll. Abr. 809. pl. 45. 2 Mod. 30.

6. Jackson *versus* Humphreys.

[Trin. 5 Ann. B. R.]

IN *escape*, against the sheriffs of *London*, the plaintiff declared that he levied a plaint in the sheriff's court against *J. S.*, being then in the counter in custody on a former plaint levied against him by *J. N.*, and that the defendant being so in custody was suffered to escape. The defendant demurred, and insisted, * that there ought to have been a precept sued out on the latter plaint, on which the sheriff might have returned a *cepi*: as if *H.* is arrested by the sheriff *ad seclam A.*, and afterwards another writ is

A. levies a plaint in the sheriff's court of London against B., being in custody on a former plaint by C., B. escapes, A. may bring escape.

* [274]

5 Co. 89.
9 Co. 68. Cra.
Jac. 473. 8 Co.
126. 1 Rol.
Abr. 310.

delivered *ad seclam B.*, he is now in custody for *B.*, and the very delivery of the writ to the sheriff was an arrest in law, and in debt for escape *B.* must declare that *H.* was arrested on this writ; for the declaration must be according to the operation of law, and not according to fact. *Vide* 5 Co. 89. But after two terms debate, *Holt*, Chief Justice, having looked on *Mackally's* case, said, that upon entering a plaint in the counter, there never is any precept awarded; but the serjeant of the mace arrests the party by his general authority, and therefore there is nothing more to be set forth than is set forth in this case; for by entering the plaint and charging the defendant in the counter, he is in actual custody of the sheriff: So if the sheriff of *Northumberland* have a man in custody in *Northumberland*, and the sheriff is himself here in town, and a writ is delivered to him against that person, he is in his custody immediately upon that writ; otherwise if the man was out of the county at the delivery of the writ, as in case the sheriff was bringing him to *Westminster* on a *babeas corpus* (a).

(a) *R. Bull v. Steward*, 1 *Wils.* 255. that an officer of an inferior court could not, in an action of escape on mesne process, take advantage of an error in the process of the inferior court, provided he could justify the arrest; and that after verdict, judgment should not be arrested for want of shewing the cause of action to be such whereof the inferior court had jurisdiction. In *Lucking v. Denning*, ante 201. it was held, that though it appeared at the trial on escape under process of an inferior court, that the cause of action arose out of the jurisdiction of that court, the plaintiff should recover. So in *Higginson v. Sherif, Com.* 153. a plea that the cause of action in the inferior court arose out of the jurisdiction of that court, was held bad. An action on the case may be maintained for the escape of a person in custody under a *capias ut legatum* on mesne process, *Cook v. Champneys*, 2 *Str.* 901. So on a writ *de excommunicato capiendo*, *Slipper v. Mason*, 2 *Ld. Raym.* 788. So for the escape of a person arrested by *latitat*, and brought by *babeas corpus* before a judge of *C. B.*, and by him committed to the Fleet, charged with the *latitat*, although no process of *C. B.* appeared, *Gambier v. Wright*, 2 *Str.* 951. It is

an escape to suffer a prisoner to walk at large through the town, though attended by a keeper, *Balder v. Temple*, *Hob.* 201. It is a voluntary escape for the gaoler to make a prisoner a turnkey, and permit him to go out on errands, *Wilkinson v. Salter, Ca. Temp. Hard.* 310. An action will lie for the voluntary escape of a prisoner on mesne process, though he returns the same day, and the plaintiff knowing of the escape afterwards, proceeds to judgment against him, *Ravenscroft v. Eyles*, 2 *Wils.* 294. A person having, after judgment, surrendered to *Newgate* in discharge of her bail, where the plaintiff intended to charge her in execution, as the sheriff was carrying her to the chambers of the Chief Justice by virtue of a *babeas corpus*, was rescued, and the sheriff was answerable for her escape, *Crompton v. Ward*, 1 *Str.* 429. The sheriff is not liable to answer for an escape from a special bailiff appointed by the plaintiff himself, *De Moranda v. Dunkin*, 4 *T. R.* 120. The sheriff's return of *non est invent.* on the back of a writ is sufficient evidence of the writ having been delivered to him, *Blatch v. Archer, Cowp.* 63. The bailiff of a liberty, who has the return and execution of writs, is liable to an action of debt for an escape by removing

ing a prisoner taken in execution to the county gaol without the liberty, and then delivering him to the sheriff, *Boothman v. Ld. Surry*, 2 *Term Rep.* 5. The plaintiff was nonsuited because he could not prove any debt due to him from the prisoner, who escaped on mesne process, *Alexander v. Macanley*, 4 *T. R.* 611. It is no defence that the gaol was demolished by rioters; for nothing but the act of God and the King's enemies will excuse, *Elliott v. Duke of Norfolk*, 4 *T. R.* 789. After an arrest on mesne process the bailiff

may suffer the prisoner to go at large, provided he has him at the return of the writ, *Atkinson v. Matteson*, 2 *T. R.* 172. The sheriff is not liable to an action on the case as for an escape for keeping a prisoner in mesne process in his custody out of gaol after the return of the writ and afterwards carrying him to gaol, if the jury find that the plaintiff has not been delayed or prejudiced in his suit, *Planck v. Anderson*, 5 *T. R.* 37. *Vide Bonafons v. Walker*, 2 *T. R.* 126.

Escrow.

Watts *versus* Rosewell.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 803. S. C.]

IN *debt* upon a bond, the defendant pleaded it was delivered as an escrow, to be his deed, upon the plaintiff's sealing and delivering a general release, which was not done, *et sic non est factum, & hoc paratus est verificare, &c.* The plaintiff demurred, and shewed for cause that the plea should have concluded to the country; and the reason insisted upon in argument was, that it is a special negative of the affirmative in the declaration, and the general conclusion in the negative had waived the special matter precedent; and 1 *Ven.* 210. was quoted as an authority in point. Though it was admitted, that if the plaintiff had pleaded over, and taken issue upon the special matter, it had been well. On the other side was cited 1 *Keb.* 30, 242.; but *note*, no judgment is entered in that case. But in the principal case judgment was given for the plaintiff, because the precedents are accordingly.

Plea, delivered as an escrow, ought to conclude to the country. *Plowd.* 66. b. *Hob.* 246. *contra.* *Far.* 53, 105. *Cumb.* 86, 311, 479. 6 *Mod.* 217. *S. C.* *Holt* 213. 6 *Mod.* 217.

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6 *Mod.* 217, 218. *Ante* 2. *Com. Dig.* *Pleader*, E. 32. 5th vol. 3d edit. pa. 414.

Estoppel.

1. Gilman *versus* Hoare.

[Mich. 4 W. & M. B. R.]

Lease for years may operate as to part by estoppel, and as to the residue by passing an interest. Cro. El. 36, 37. 4 Co. 54. 3 D. 279. p. 9. S. C. Skin. 324. Carth. 292. 3 Lev. 213. 3 Salk. 152.

DEBT for rent on an indenture of lease for forty years. The defendant pleaded that a year before the plaintiff made a lease for forty years to *A.*, *virtute cujus A.* entered and was possessed; and that though the defendant did afterwards enter, yet he was accountable to the said *A.* On demurrer *Cartbew* argued, that the second lease was void for the first thirty-nine years, and so was the reservation, and that here was no estoppel, because the last of the forty years passed by the lease. *Vide Plow.* 453, 422. 1 *Inst.* 47. Where tenant, *pur auter vie*, made a lease for years by indenture, and afterwards purchased the reversion, and it was held that the lease ended by the death of *cestui que vie*, so is 3 *Cro.* 707. *Et per Holt*, C. J. The reason of the case in 1 *Inst.* is, because tenant for life has a freehold, which is a greater estate, and the lease will need no estoppel, if the life endure: But in the principal case the lease must necessarily be void for thirty-nine years, unless made good by estoppel; and that a lease for years may operate and take effect as to part by estoppel, and as to the residue by passing a real interest, is very plain from the common case of concurrent leases, which are all of them as to part good by estoppel, and a rent reserved thereon (*a*).

(*a*) *Vide Ludford v. Barber*, 1 *T. R.* 5 *T. R.* 4. *Hermitage v. Tomkins*, 1 *Ld.* 86. *Doe v. Burt*, *ib.* 701. *Fairtitle v. Raym.* 729. *Goodtitle v. Morfe*, 3 *T. R.* *Gilbert*, 2 *T. R.* 169. *Cooke v. Loxley*, 365.

2. Rock *versus* Leighton.

[Mich. 12 Will. 3. B. R. *Vide post*, Title *Executors*.]

3. Trevivan *versus* Lawrance & al.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1036. S. C.]

IN *ejectment* upon the demise of *R. V.* a special verdict was found, *viz.* that *S. R.* was seised in fee of the lands in question, and that being so, *H. M.* recovered judgment against him in debt for 127*l.* in *B. R.* in *Michaelmas* term 1656, which they find *in hac verba*: That in *Hilary* 13 *W.* 3. the lessor of the plaintiff, as administrator of the said *H. M.*, sued a *scire facias*, reciting the judgment as of *Trinity* term, against the tenants of the lands which the said *S. R.* had on the day of the judgment recovered, or at any time afterwards. That the tenants (of which the defendant was one) appeared and pleaded *nul tiel record*, and issue joined thereupon, and a day was given to bring in the record; at which day the record of the judgment of *Michaelmas* term 1656 was produced, and judgment given *quod habetur tale recordum*, and execution awarded: That thereupon the plaintiff sued out an *elegit*, upon which an inquisition was taken, and the lands in question extended; and for the variance between the judgment recited in the *scire facias*, and that given in evidence, the jury doubted. After argument, and consideration from *Easter* term to *Michaelmas*, the Court held, that the defendants were estopped by this judgment in the *scire facias*, to say that there was no judgment in *Trinity* term, because that matter had been tried against them, and the defendants were concluded to falsify the judgment in the point tried: Thus, if a *scire facias* be brought against the issue in tail upon a judgment in debt against the ancestor, and he being warned makes default, he shall not come afterwards and say that he is tenant in tail; so if he plead any other matter, and it is found against him: Also they held the judgment upon the *scire facias* is sufficient title in the ejectment, and the first judgment need not be given in evidence.

2dly, The Court held, not only that the parties, but all claiming under them, on this recovery, would be bound by this estoppel: As if a man makes a lease by indenture of *D.* in which he hath nothing, and after purchases *D.* in fee, and after bargains and sells it to *A.* and his heirs; *A.* shall be bound by this estoppel; and that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel (*a*).

6 Mod. 256.
Scire facias
against ter-
tenants reciting
the judgment of
a wrong term,
and upon nul tiel
record judgment
for the plaintiff,
and after elegit,
ejectment
brought, the de-
fendant is estop-
ped to take ad-
vantage of the
variance. Post
291. 3 Salk.
151. S. C. Holt
282.

1 Rol. 863.

1 Sid. 54.
Raym. 19.
1 Lev. 41.
1 Keb. 112, 141.

Where estoppel
works on the in-
terest of the
land, it runs
with it and is a
title. 1 Lev. 43.
2 Mod. 115.
2 Keb. 364.
Mod. Cases 258.
Raym. 21.
March 64. pl.
99. Jon. 460.
Co. Litt. 352. a.

(*a*) *R.* upon the authority of this case, *Sir.* 818. that an assignee may take advantage of an estoppel, for it runs with the land.

3dly, The

Jury is bound by estoppel unless the party leaves the fact at large by pleading.

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Moor 323. Lat.
510, 1644. Co.
Lit. 47. b.
2 Co. 4. 5. Vi.
Str. 420.

3dly, The Court held, That not only the parties and all claiming under them, but the Court and jury were bound by this estoppel, and that the jury cannot find against this estoppel; and the Court took this difference, That where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff, that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. Thus in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence, That the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but if the defendant plead *nihil habuit*, &c. and the plaintiff will not rely on the estoppel, but reply *habuit*, &c. he waives the estoppel and leaves it at large, and the jury shall find the truth notwithstanding his indenture.

4. Smith *versus* Villars.

[Trin. 1 Ann. B. R. *Vide* Title *Abatement*, pl. 7.]

5. Kemp *versus* Goodal.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1154. S. C.]

Where the estoppel appears on the record, the other side may demur. Co. Lit. 47. Cro. Jac. 312. 9 Co. 60. Cro. Ek. 362. pl. 24. Skin. 49. 1 Stran. 611.

IN *debt* for rent upon an indenture, if the defendant pleads *nil habuit in tenementis*, the plaintiff need not reply that estoppel, but may demur, because the declaration is on the indenture, and the estoppel appears on the record; otherwise if he had declared *quod cum dimisisset*. So is *Speak's* case, *Hob.* 206. The plaintiff declares on the levy, and therefore no estoppel, because there no estoppel is pleaded, and relied upon: But if he had declared upon the return *prout patet per recordum*, the defendant could not have pleaded payment; if he had, the plaintiff might have demurred without pleading the estoppel (a).

Judgment was given for the plaintiff nisi.

(a) *R. acc.* 3 *Lev.* 146. *Ld. Raym.* 1 *Bro. Par. Ca.* 334. 1550. *Str.* 817. 1 *Barn. B. R.* 113.

Evidence.

1. Anonymous.

[*Coram* Holt, C. J. At nisi prius at Hertford, 1690.]

IT was adjudged, *per Holt*, C. J. That in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense; but in case on *non assumpsit*, the statute of limitation cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise (a).

Vide 2 Roll.
Abr. 682, 683.
Ante 129.

(a) *R. acc.* 1 *Ld. Raym.* 153. *Vi. Anon. ante* 154.
notes to *Heyling v. Hastings*, ante 29.

2. Dominus Rex *versus* Dominum Preston.

[Mich. 3 W. & M. B. R.]

LORD *Preston* was committed by the court of quarter sessions for refusing to be sworn to give evidence to the grand jury on an indictment of high treason. He was brought by *habeas corpus* in B. R.; and *Holt*, C. J. said, It was a great contempt, and that had he been there he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed.

Refusing to give evidence to the grand jury, is a contempt fineable.

3. Howard *versus* Tremaine.

[Mich. 4 W. & M. B. R.]

UPON a bill exhibited in Chancery to perpetuate testimony, the defendant (who was heir at law) stood in contempt, and would not answer, and thereupon the plaintiff had a commission, and examined witnesses to the matter of his bill *de bene esse*, and the defendant joined in commission, and cross-examined some of the witnesses produced for the plaintiff, and before the answer came in the witnesses died: And upon a trial in ejectment, in which

Carth. 265.
Depositions taken in Chancery *de bene esse*, are good evidence at law, where the witnesses die before answer. Post 281, 286.
2 Salk. 555,

691. Raym.
170. 4 Mod.
246. S. C. .
1 Show. 363.

which the plaintiff made title under this will, the question was, Whether these depositions could be given in evidence? And a verdict was taken for the plaintiff, but the *postea* stayed till the opinion of the Court was had on this point: And it was not questioned, but if the defendant had answered, and these depositions had been taken after answer, they had been good evidence against the same parties, and those that claim under them. *Et per Eyre, J.* It might be very inconvenient if this should not be allowed as evidence: how otherwise can a devisee examine witnesses in *perpetuam rei memoriam*? For the heir at law will not answer to the plaintiff's bill; and on the other side he will not call in question the title of the devisee, as long as he has witnesses alive to prove the will; but as soon as they are dead, then will commence his suit(a). *Vide Shower* 363. S. C.

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Vide Godb. 326.
Hob. 112.
1 Ro. 679.
Hard. 232.
1 Cro. 352.
Hard. 315.
Raym. 335, 6.

1 Lill. 554.

(a) If the defendant is not in contempt, such depositions are not admissible evidence, ——— v. *Brown*, *Hard.* 315. *Vide Howard v. Tremain*, *Raym.* 335. 4 *Mod.* 147. It is sufficient proof that depositions were taken upon bill and answer, if the fix clerks book mentions them in the enrolment of the decree, though then lost. 5 *Mod.* 211. Depositions can only be given in evidence for and against parties to the suit in which

they were taken, *Rusworth v. Countess of Pembroke*, *Hard.* 472.; except in case of tolls and customs, and where hearsay and reputation are evidence, or in contradiction to what the witness swears in another cause. *Bull. N. P.* 239, 240. Depositions may be read if the bill is dismissed because the matter is not proper for equity to decree; but not if it is dismissed for the irregularity of the complaint. *Gilb. Evid.* 4th edit. 63, 64.

4. Darby *versus* Boucher.

[Pas. 5 W. & M. C. B.]

In indeb. assumpsit infancy may be given in evidence on non assumpsit.
1 Vent. 170.
2 Lev. 144.
Ante 170.
Gilb. C. B. 53.
Ca. B. R. 197.

IN an *assumpsit* for money lent, and likewise for money laid out to the use of the defendant's wife *dum sola*. Upon non *assumpsit* pleaded, upon trial before Treby, C. J. the defendant offered to give in evidence the infancy of the feme at the time of the promise, which the Chief Justice doubting of, it was referred by consent to him as a case, who consulted with the rest of the judges, and there being ten of the judges then present, they all agreed that upon the general issue such evidence hath been of late admitted (b); and the Chief Justice in giving his opinion said it was true, that in the books such resolutions are not to be found, for that *actions on the case* have not been so common till of late; and that as to the objection, That the plaintiff may at this rate be surpris'd, who may be sup-

(b) Whatever defeats the promise is good evidence on non *assumpsit*. 2 *Str.* 733.
posed

posed to come prepared to prove nothing but his debt; the same objection might be made against allowing payment to be given in evidence in case of an *assumpsit* in law, admitting there was a difference betwixt an express *assumpsit* and an *assumpsit* in law, and then upon an express special *assumpsit* infancy cannot be given in evidence upon the general issue: Yet he said, Supposing that in this case there had been an express *assumpsit* to pay the money, or the money laid out, this had been void, it being no more than the law implied upon the lending and laying out; and the Chief Justice said, that the promise of an infant is absolutely void; but a bond takes effect by sealing and delivery, and consequently is a more deliberate act, and therefore is only voidable (a). And in this case there was another question made, which was, One lends an infant money, who employs it in paying for necessaries, whether in that case the infant be liable? And it was held clearly by the Chief Justice, that the infant is not liable; for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessaries will not by matter *ex post facto* entitle the plaintiff to an action (b).

Cro. Jac. 494.
2 Lill. 52. One lends an infant money, and he lays it out in necessaries, yet the infant is not liable. Post 387.

(a) This point is very fully discussed and illustrated by Lord Mansfield, in *Zouch ex dem. Abbott v. Parsons*, 3 Bur. 1794.

(b) It is otherwise in equity, for if one lends money to an infant to pay a debt for necessaries, and in consequence thereof the infant does pay the debt, here, although he may not be liable at law, he must nevertheless be

so in equity; because in this case the lender of the money stands in the place of the person paid, viz. the creditor for necessaries, and shall recover in equity as the other should have done at law, *Marlow v. Pitfield*, 1 P. Wms. 558. So a husband is liable in equity for money lent to his wife for necessaries, *Harris v. Lee*, 1 P. Wms. 482. Vide *Ld. Raym.* 344.

5. Anonymous.

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[Pas. 5 W. & M. C. B.]

NOTA; Treby, Chief Justice, related a case upon the clause of the statute of frauds, which says, *that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless it be in writing*. The case was, That a parol promise was made to pay so much money upon the return of such a ship, which ship happened not to return within two years time after the promise made, and whether this parol promise was void by the statute of frauds, was made a question before all the judges: And they were of opinion that this was a good promise, and not within that clause

Parol promise to be performed on a contingency is not within the statute of frauds, though that happen not within a year.

of the statute, for that by possibility the ship might have returned within a year; and though by accident it happens not to return so soon, yet, they said, that clause of the statute extends only to such promises, where, by the express appointment of the party, the thing is not to be performed within a year (a).

(a) *R. acc.* That a promise to pay on marriage is not within the statute case cited *per Holt*, 1 *Ld. Raym.* 316. *Vide ac. Anon. Comb.* 463. So in *Fen- ton v. Emblers*, 3 *Bur.* 1278. 1 *Bl.* 353. it was ruled that a promise to leave money by will was not within the statute, and the Court allowed the rule to be as here stated. *Vide* 1 *Ld. Raym.* 316. *Skin.* 353. *Holt* 326.

6. Brook *versus* Smith.

[Pas. 5 W. & M. Coram Holt, C. J. *At nisi prius*, Middlesex.]

Where upon non assumpsit, condemnation in foreign attachment may be given in evidence, and where it must be pleaded, and how. Post 291. *Vide* post, pl. 32. contra. Co. Lit. 282. b. 283. a. *Skin.* 639. *Vide* *Ld. Raym.* 180, 727. *Bl.* 834. 3 *Will.* 297.

IN *assumpsit* evidence was given, that the debt was attached by the custom of London before the action brought, and condemnation had there before plea pleaded, and it was urged that this should relate to defeat the action. But *per Cur.* it was ruled, that if an attachment and condemnation be before the writ purchased, it may be given in evidence on the general issue, because that is an alteration of the property before the action brought; but if the attachment only be before the writ purchased, it ought to be pleaded in abatement of the writ; and if the condemnation be after the action commenced and before the plea pleaded, then it may be pleaded in bar, but shall not be given in evidence on *non assumpsit*, for that the property is not altered until condemnation; and the plaintiff had a verdict.

7. Smartle *ex dimiss.* Newport *versus* Williams.

[Pasch. 6 W. & M. B. R.]

Indenture of bargain and sale inrolled, may be given in evidence without proving the execution. Ante 245. S. C. Comb. 247. *Holt* 478. 3 *Lev.* 387. S. C. Co. Lit. 230. b. Co. Lit. 7. a. Ante 246. Co. Lit. 225. b.

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UPON the trial at bar in this case (*Vide ante* title *Disseisin*, pl. 1.) a deed of bargain and sale acknowledged by the bargainee and inrolled, by which a term for years was assigned, was given in evidence without any proof made of the bargainor's sealing and delivery thereof; and after debate it was allowed *per Holt* C. J., and *Eyre* J., & tot. *Cur.* For the acknowledgment of the party in a court of record, or before a master extraordinary in the country, (as this was,) is good evidence of it being sealed and delivered; and such an acknowledgment estops a man from pleading *in 3 Lev. 387* the action whereby is by the bargainor undoes in both M. S. S.

pleading *non est factum*. Also inrolments of deeds on the statute are admitted every day in evidence without witnesses of the sealing and delivery; and it is the acknowledgment which gives it credit, and not its operation or contents. Also they held a sworn copy of a deed inrolled good evidence (a).

(a) *Vide* some observations on the authority of this case, *B. N. P.* 256.; it appears that the acknowledgment was made by the bargainer. from which, and the report in 3 *Lev.*

8. Dominus Rex *versus* Paine.

[*Hill.* 7 *Will.* 3. *B. R.* 1 *Ld. Raym.* 729. *S. C.*]

IN an information for a libel against the Government, not guilty being pleaded, upon trial the attorney-general offered in evidence depositions taken before a justice of peace relating to the fact, the deponent being since dead. *Et per Cur.* Upon advice with the justices of the Common Pleas, in cases of felony such depositions before a justice, if the deponent die, may be used in evidence by the statute 1 & 2 *Ph. & Mar. c.* 13. (b) But this cannot be extended

Carth. 405. *S. C.*
5 *Mod.* 163.
Depositions before a justice, deponent since dead, evidence only in felony.
2 *Jones* 53.
2 *Salk.* 555,
691. *Ante* 278.
Post 286. 1 *Lev.*

(b) The stat. 1 & 2 *Ph. & M. c.* 13. enacts, That justices, when any prisoner is brought before them for manslaughter or felony, shall, before any bail or mainprize, take the examination of the prisoner, and the information of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put into writing before they make the bailment, and certify such examination, together with the bailment, at the next general gaol delivery. There is also a provision, that upon inquisitions before the coroner for murder or manslaughter, he shall put in writing the evidence given to the jury before him, being material, and certify the same in like manner. The 2d and 3d *P. & M. c.* 10. extends the same provisions to the cases where the prisoner is committed. But there is nothing in either of the acts which ordains, that if the deponent die his depositions may be given in evidence on the trial. In 2 *Hale P. C.* 52. it is said, "The examinations," (*viz.* of

the party accused) "may be read in evidence against the prisoner, and so may the information of witnesses taken upon oath, if they are dead, or not able to travel, for they (1) are judges of record, and the statute enables and requires them to take these examinations." The same position is in 1 *Hale* 305.

In 2 *Hawk. cb.* 46. *f.* 6. it is said, That the examination of an informer, taken by virtue of these statutes, may be given in evidence at the trial of the inquisition or indictment, if it be made out by oath to the satisfaction of the Court that such informer is dead, or unable to travel, or kept away by the means or procurement of the prisoner. Sir *Mic. Foster*, enumerating the instances wherein the law makes a difference between the cases of *petit* treason and murder, says that, "upon the foot of 5 and 6 *Ed.* 6., informations taken before justices of peace are not evidence to ground a conviction for *petit* treason if the party be living, though unable to travel, or kept out of the way by the prisoner;" *Cro.*

(1) *i. e.* the justices.

Law.

10. Anonymous.

[Pasch. 8 Will. 3. B. R.]

IN an *action on the case* for money had and received to the plaintiff's use, upon the evidence it appeared, that the plaintiff's wife was executrix, and that the money was paid to the defendant as due to her; and the plaintiff was nonsuited, because the action ought to have been brought by husband and wife as executrix, for it being paid without any authority from the husband, it remains as a debt due to the executrix; and if the husband dies, the wife may bring an action for it; but if the money had been received by authority from the husband, then it had been as his receipt, and as his money, and the action might well have been brought in his name, and the money would have been assets in her hands.

Payment of money due to the wife as executrix, is not evidence to maintain action for money received to husband's use, Cro. Car. 417. Hob. 189. 1 Roll. Rep. 312. Noy 70. Br. Bar. and Feme 57.

11. Middleton *versus* Fowler & al.[Mich. 10 Will. 3. Coram Holt, C. J. *At nisi prius.*]

AN *action upon the case* upon the custom of the realm was brought against the defendants being masters of a stage-coach; and the plaintiff set forth, that he took a place in the coach for such a town, and that in the journey the defendants by their negligence lost a trunk of the plaintiff's. Upon not guilty pleaded, upon the evidence it appeared, that this trunk was delivered to the person that drove the coach, and he promised to take care of it, and that the trunk was lost out of the coachman's possession; and if the master was chargeable with this action, was the question. Holt, C. J. was of opinion, that this action did not lie against the master, and that a stage-coachman was not within the custom as a carrier is, unless such as take a distinct price for carriage of goods as well as persons, as waggons with coaches; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom; for no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master; and the plaintiff was nonsuited (a).

Master of a stage-coach not chargeable for goods lost by the driver, unless the master takes a price for the carriage of goods. 1 Mod. 198. 3 Mod. 323. 3 Lev. 258. 1 Danv. 3. 2 Saund. 115. 2 Salk. 423. 426, 440, 441, 444, 613, 674. 4 Leon. 123. 1 Show. 29. Hob. 206. Palm. 534. 2 Cro. 202. Hutt. 121. Skin. 625. S. C. Holt 130. 2 Show. 128.

(a) *Vide Rep. B. R. Temp. Hard. 85, 194. Comyns 25.*

12. Dominus Rex *versus* Whiting.

[Mich. 10 W. 3. *Coram* Holt, C. J. *At nisi prius, at Guildhall.* 1 Ld. Raym. 396. S. C.]

On indictment for a cheat in procuring a note from H., H. cannot be a witness. Post pl. 20. Post 286, 287. 1 Lill. 547. Raym. 191. Hob. 91. 2 Ld. Raym. 1179. Ante 118. per Holt. Holt 755. S. C. Ante 119.

IN an information against the defendant for a cheat, upon trial the fact appeared to be, that he had a promise of a note for 5 *l.* from his mother-in-law, and by some slight got her hand to a note of 100 *l.* *Et per Holt, C. J.* The mother cannot be a witness, being concerned in the consequence of the suit, which is a means to discharge her of the 100 *l.* For though the verdict upon this information cannot be given in evidence in an action upon the note for the 100 *l.*, yet we are sure to hear of it to influence the jury; and he said he could not distinguish this from the cases of perjury or forgery, where the party, whose interest is defeated or prejudiced by the deed, &c., is no evidence to prove the perjury or forgery (*a*).

(*a*) The authority of this case is destroyed by the *King v. Bray, Temp. Hard.* 358., the *King v. Broughton*, 2 *Str.* 1229., and *Abrahams v. Bunn*, 4 *Bur.* 2251. In the latter case, a person who had borrowed and repaid money upon an usurious contract was held a competent witness in an action *qui tam* to prove the usury.

The present case was held not to be law; and it was laid down as an established rule that the question in a criminal prosecution being the same with a civil cause in which the witness was interested, went generally to the credit, unless the judgment in the prosecution where he was a witness could be given in evidence in the cause where he was interested. It was also stated as established, that where the matter was doubtful the objection should go to the credit, and not to the competence. *Vide Martin v. Drayton*, 2 *T. R.* 496.

With respect to perjury, it was ruled in *Rex v. Ellis*; 2 *Str.* 1104., *Rex v. Nunn*, 2 *Str.* 1045., that perjury could not be proved upon an indictment by the evidence of the person against whom it was committed; but those cases, as well as the present, are overruled in *Rex v. Broughton*; and *Bartlett v. Pickersgill*, cited 4 *Bur.* 2255. affords an instance of such evidence be-

ing allowed. Still it may be questionable whether the party grieved can be a witness to prove perjury upon the stat. of 5 *Eliz.* ch. 9., as by that statute the party injured is entitled to 10 *l.* The inadmissibility of such evidence was determined in *Bacon's case*, 2 *Rel.* 46. 685. 21 *Vin.* 363. and is recognized in 2 *Harw.* ch. 46. s. 24. *Bull. N. P.* 289. 2 *Hale's P. C.* 281. As the statute gives the action to the party upon the offender being convicted, such conviction tends directly to his interest, and must be given in evidence upon the action; and therefore the testimony seems inadmissible.

But a person from whom goods are stolen is admissible to prove the felony, though by stat. 21 *H. 8.* c. 21. he is entitled to restitution, 2 *Hale* 281. Persons entitled to rewards for apprehending highwaymen, burglars, &c., or convicting Popish priests, are not disqualified thereby from giving evidence. *Onst. N. P.* 257. *Espinasse* 713.

A person whose hand is forged is still considered as incompetent to prove the forgery, unless he has a release from those interested in the validity of the instrument, as is evident from daily practice. An exception is stated in *Bull. N. P.* 289., where he is not directly interested in the question, as in

Wells's

Wells's case, who was indicted for forging a receipt from *A.*; *A.*, having recovered the money in an action against *Wells*, was admitted to prove the forgery.

But in a case at the *Old Bailey*, *Sep. Sess. 1792.* the obligor in a bond being indicted for altering a receipt for interest so as to make it appear a receipt for principal and interest, *Hotham*, B. held the obligee to be an incompetent witness, although he had obtained a verdict invalidating the receipt, judgment not having been entered. If a similar point were again to arise, it

might not be unimportant to consider how the witness in such a case can derive any benefit from the conviction of the offender, as the goods being forfeited to the crown, he is thereby deprived of the fruit of his verdict, and loses all chance of satisfaction for his demand; and it may, perhaps, be found, that the inadmissibility of such testimony has been too generally taken for granted, without adverting to the difference of consequences which might result from its being received between one case and another. *Vide* note to *pl. 13.*

13. *Smith versus Sir Richard Blackham.*

[*Mich. 10 Will. 3. Coram Treby, C. J. At nisi prius; at Guildhall.*]

TREBY, C. J. An heir apparent may be a witness concerning the title of the land, but a remainder-man cannot, for he hath a present estate in the land; but the heirship of the heir is a mere contingency. The particular case was this: The heir of a bankrupt was brought to prove a debt due to him in an action by the assignee, and objected that the surplus of the real estate (which is only to come in aid of the personal estate) being to go to the bankrupt and his heirs, the heir by swearing as to the personal estate has this benefit, that he discharges the real estate as to so much: But the C. J. allowed him to be witness, saying that was too remote a contingency.

Tenant in tail, remainder in tail, he in remainder cannot be a witness concerning the title of these lands; for he hath an estate, such as it is (*a*).

(*a*) There have been a great many distinctions with respect to the exclusion of witnesses by interest, and the subject has been involved in some degree of confusion. But the true criterion seems to be ascertained by *Gilb. L. Ev.* (225. 4th edit.) where interest is defined to be "a certain benefit or disadvantage to the witness attending the consequence of the cause one way;" and by the case of *Bent v. Baker*, 3 *T. R.* 27., where it appears to be the opinion of the Court, that though the witness may be interested in the question put to him, his testimony is admissible if

he is not interested in the event of the cause. In *Carter v. Pearce*, 1 *T. R.* 164. it is also held, that to shew a witness interested, it is necessary to prove that he must derive a certain benefit from the determination of the cause one way or another. The inclination of courts of justice has lately been, in doubtful cases, to let the objection go rather to the credit than to the competence of a witness, *Rex v. Bray*, *Temp. Hard.* 358. *Abrams v. Bunn*, 4 *Bur.* 2251. *Walton v. Shelley*, 1 *T. R.* 300. *Bent v. Baker*, *ubi sup.* A steward of a manor is competent to prove a custom

Heir at law may be witness of the title, remainder-man not. *Vide* a *Lill.* 705.

tom for tenants to pay a fine due on the death of the lord, and to be readmitted, though he is entitled to a fee on such admission, *Champion v. Atkinson*, 3 *Keb.* 90. The deputy of a patentee is a competent witness in support of the patent, *Hanning's case*, 1 *Mod.* 21. So a person who had sold an estate without covenants or warranty is competent to prove the title of the vendee, 1 *Str.* 445. A person rateable to the poor, but not actually rated, may prove the ratability of another person, *Rex v. Proffer*, 4 *T. R.* 17. A surety in an administration-bond may prove a tender by the administratrix, *Carter v. Pearce*, 1 *T. R.* 163. In covenant upon lease from *A.* to *B.*, the issue being whether *C.* (whose title both admit) demised first to *A.* or *D.*, *C.* is competent to prove the priority, *Bell v. Harwood*, 3 *T. R.* 308. A factor who receives a commission may prove a contract between buyer and seller, *Dixon v. Cooper*, 1 *Wils.* 40. An executor who takes no beneficial interest may prove the validity of the will under which he is appointed, though he has acted under it, and may have rendered himself liable to actions on its being set aside, *Lowe v. Jelffe*, 1 *Bl.* 365. *Goodtitle v. Welford*, *Doug.* 139. A bare trustee may prove the execution of the deed to himself, *Goff v. Tracy*, 1 *P. Wms.* 289. *Croft v. Pyke*, 3 *P. Wms.* 181. A creditor who has sold his interest in a debt is a good witness to support a commission of bankrupt, *Granger v. Furlong*, 2 *Bl.* 1273. A tenant in possession is not a good witness to support his landlord's title, *Doe v. Williams*, *Corop.* 621. Bail cannot be witnesses for their principal, *per Buller*, J. 1 *T. R.* 164.; nor a *prochein amy*, or guardian, for the infant, 1 *Str.* 506. 2 *Str.* 1026. Nor a person who has worked in a town, not being free of a company, to disprove a custom against working without being free, *Corporation of Carpenters*

in Shrewsbury v. Hayward, *Doug.* 359. Nor a person who thinks himself interested, though he is not so, *Fotheringham v. Greenwood*, 1 *Str.* 129. As to administrators *duranti minori aetate*, *vide Fotherby v. Pate*, 3 *Atk.* 603. As to co-defendants, *Dixon v. Parker*, 2 *Vez.* 219.

It has been held, that one insurer upon the same ship cannot be evidence against another, *Ridout v. Johnson*, *Bull. N. P.* 283. Nor a person who had laid a wager for another who had laid the same wager against the stakeholder, *Rescous v. Williams*, 3 *Lev.* 152. Nor one part owner of a ship on behalf of another, at the suit of the ship's husband, who insured the ship and brought actions against each of them for the money paid on that account; to disprove the plaintiff's authority to make such insurance, *French v. Blackhouse*, 5 *Bar.* 2727. But the authority of these cases seems weakened by the opinion of the Court in *Bent v. Baker*, 3 *T. R.* 27.

A bankrupt cannot be a witness to increase his fund unless he releases his right to the surplus, and has got his certificate, *Busler v. Cook*, *Corop.* 70. Nor on a second bankruptcy, with such a release, if he has not paid 15s. in the pound, *Kennett v. Greenwallers*, *Essex.* 592. Nor to prove a debt which had been proved under the commission usurious, *Martin v. Drayton*, 2 *T. R.* 496. If he has had his certificate, and obtained his allowance, his evidence may be admitted, *Russell v. Russell*, 1 *Bro. Cb.* 2. 69.

The question, Whether evidence be admissible or not? depends on the subject matter to which it is applied, *Rex v. Proffer*, 4 *T. R.* 17.

A new trial will not be granted upon discovering that a witness examined was interested; the objection must appear at the trial, *Turner v. Pearce*, 1 *T. R.* 717.

14. *Ford versus Hopkins.*

[Hill. 12 Will. 3. *Coram* Holt, C. J. *At nisi prius, at*
Guildhall.]

TROVER for million-lottery-tickets; upon evidence it appeared, that the plaintiff had given the tickets in question to a goldsmith to receive the money due on them; that some payments were due, and some were not; that this goldsmith had received tickets of the defendant, and given a note to pay him so many million-lottery-tickets; that the plaintiff's tickets were delivered to the defendant by the goldsmith upon this note. It was insisted on, that this note under the goldsmith's hand could be no evidence against the plaintiff; but it was read. And Holt, C. J. said, that the way and manner of trading is to be taken notice of (a), and the best proof that the nature of the thing will afford is only required: When goldsmiths give their notes, no witnesses are by; and their notes to pay money or tickets are evidence of the receipt of money. If money is stolen and paid to another, the owner of the money can have no remedy against him that received it: But if bank-notes (b), exchequer-notes, or million-tickets, or the like, are stolen or lost, the owner has such an interest or property in them, as to bring an action into whatsoever hands they are come: Money or cash is not to be distinguished, but these notes or bills are distinguishable, and cannot be reckoned as cash, and they have distinct marks and numbers on them. He agreed in this case, that if the exchequer or any private person had paid to the goldsmith the money or the tickets, it would have been a good payment against the owner; but whether it would be so where tickets not due are bought for a valuable consideration, he doubted; but as the case was, the goldsmith having tickets of the plaintiff, and of the defendant, the

Goldsmith has
lottery-tickets of
A. and B., and
delivers A.'s
tickets to B. for
his own, A. may
maintain trover
against B. Sav.
134.

Goldsmith's
note to pay is
evidence of his
receiving money.
Far. 129. Mod.
Cases 225, 248.

[284]

Ante 126.

(a) *Vide* *Noble v. Kennoway*, Dougl. 510. *Ekins v. Mackbole*, Ambler 184.

(b) In the case of *Miller v. Race*, 1 Bur. 452., where a plaintiff brought an action of trover for a bank note which had been stolen, but came into his hands in the usual course of business, Lord Mansfield, "The case of *Ford and Hopkins* was cited, but this must be a very incorrect report of that case. It is impossible that it can be a true representation of what Ld. Ch. J. Holt said: It represents him speak-

ing of bank notes, exchequer-notes, and million-lottery-tickets, as like to each other. Now no two things can be more unlike to each other than a lottery-ticket and a bank-note. The person who took down this case certainly misunderstood Ld. Ch. J. Holt, or mistook his reasoning; for this reasoning would prove (if it was true as the reporter represents it) that if a man paid to goldsmith 500*l.* in bank notes, the goldsmith could never pay them away." *Vide* also *Ante*, pa. 126.

delivery of the plaintiff's tickets to the defendant was no change of the property, or any consideration; for though the owner gave the goldsmith power to receive money for the tickets, he did not give him power to change them for other tickets: And accordingly a verdict was given for the plaintiff (a).

(a) *R.* in the case of *Hartop v. Hcare*, reported 2 *Sir.* 1187. 1 *Will.* 8. but most at large 3 *Alt.* 44., that if *A.* deposits jewels, sealed in a bag, with *B.* a jeweller, who breaks the seal and pawns them to *C.*, *C.* has no lien on them against *A.*, and is liable to an action of trover for refusing to deliver

them to him. But where goods were obtained by fraud from *A.* and pawned to *B.*, who had no notice of the fraud, and *A.* afterwards got possession of the goods, it was held that *B.* might maintain trover against him for them, 5 *T. R.* 175.

15. Gallaway *versus* Sufach.

[*Trin.* 12 *Will.* B. R.]

Levy per d. distress,
et sic non debet
payment or re-
lease is good evi-
dence; other-
wise of rasure.
Holt 299. S. C.

IN debt for rent, if the defendant plead *levy per distress*, & *sic non debet*, a release or payment is good evidence; for it proves there is no debt, and that is the issue. *Vide Cro. El.* 140., which agrees; but if the defendant plead *rasure*, & *sic non est factum*, nothing else is evidence but *rasure*. *Per Holt*, Chief Justice.

16. Thurston *versus* Slatford.

[*Mich.* 12 *Will.* 3. B. R.]

Record of ses-
sions given in
evidence to prove
the plaintiff had
not taken the
oaths, and so his
office void.
Vide ante 281.
1 *Lutw.* 905.
N. L. 281.
3 *Salk.* 155.
Holt 299.

CASE in *C. B.* upon an *indebitatus assumpsit* for 5 *l.* received to the plaintiff's use, being fees of the office of clerk of the peace of *Oxfordshire*. Upon *non assumpsit* it was insisted on that the plaintiff had forfeited his office by not qualifying himself according to law: They shewed he was admitted in *April*, and produced the record to prove he had not taken the oath. The plaintiff offered a bill of exceptions to this evidence, which was brought into *B. R.* with the record by writ of error. And *Holt*, C. J. said, that if a judge admits that for evidence, which is not, the other side cannot demur for that cause, but must tender a bill of exceptions: But he held that this record was evidence: That indeed, if there be a mis-entry, it might be supplied and corrected by other evidence; for he should not be concluded by the mistake or negligence of the officer, but still it is a record, and some proof, though not a complete proof, and might be left to the jury. He remembered a case where the university of *Oxford* en-
titled

titled themselves to a presentation by a conviction of the Earl of *Shrewsbury* for recusancy, and upon giving some evidence that the record was lost, the university was permitted to prove the effect of it by other evidence: Judgment afterwards was given on another point.

The matter of a record lost may be proved.

17. *Blainfield versus March.*

[Mich. 1 Ann. *Coram Holt, C. J. At nisi prius, at Guildhall.*]

THE plaintiff brought trover as administrator, and declared upon the possession of the intestate; and upon not guilty pleaded at the trial, the counsel for the defendant offered to give in evidence, that the pretended intestate made a will and an executor; but *Holt, C. J.* over-ruled it, and took this diversity, that where an administrator brings trover upon his own possession, the defendant may give in evidence a will, and an executor, upon not guilty; otherwise, if it be on the possession of the intestate, (as in the principal case,) for there the defendant ought to plead it in abatement, and if he does not, he shall not give it in evidence.

Far. 141. S. C. Trover by administrator on the intestate's possession, defendant cannot give in evidence a will on the general issue, otherwise if on administrator's own possession. 2 Salk. 555. Far. 129. Ante 141, 283. Mod. Cases 248. Holt 44.

18. *Price versus The Earl of Torrington.*

[Trin. 2 Ann. *Coram Holt, C. J. At nisi prius, at Guildhall.*
2 Ld. Raym. 873. S. C.]

THE plaintiff being a brewer, brought an action against the Earl of *Torrington* for beer sold and delivered; and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands; and that the drayman was dead, but that this was his hand set to the book (n): And this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more.

Evidence of beer delivered. Holt 300. S. C. Str. 1128. Rep. B. R. Temp. Hard. 378. Bull. Ni. Pri. 282. Post 690. Ante 283. Mod. Cases 264.

(a) A cooper's book, having his name set to several articles, as wine delivered to the defendant, but not signed in the presence of the clerk, was refused to be admitted in evidence for want of that circumstance, *Bull. Ni. Pri.* 282. A scrivener's book of accounts allowed as evidence of mortgage-money being paid, *Bull. N. P.*

283. The books of a deceased rector or vicar good evidence concerning tithes, 2 *Vez.* 38. 5 *T. R.* 121. *Espin.* 774. The entry in an attorney's book of a charge for drawing and ingrossing a surrender, and of the bill being paid, admitted to prove such surrender, *Warren v. Greenwille*, 2 *Str.* 1129. *Vide 4 Bur.* 1071. An entry of A's book-

book-keeper admitted to shew that eight shares of stock, bought in the name of *B.*, were paid for by *A.*; six of the receipts being in *A.*'s hand, and there being no entry in *B.*'s books relative to the transaction, *Bull. N. P.* 282. A bill of parcels, and receipt of a merchant abroad, admitted to prove the plaintiff's interest in a cargo against the insurer, *Russell v. Bobene*, 2 *Str.* 1127. Entries of a steward of sums paid for trespasses in a particular place, ruled to be good evidence in an action relative to the title of that place, *Barry v. Bebbington*, 4 *T. R.*

514. Indorsement by an obligee of interest being paid upon a bond, made ten years before the presumption of payment arose, allowed to repel that presumption, *Searle v. Ld. Barrington*, 2 *Str.* 826. 2 *Ld. Raym.* 1370. 3 *Bro. P. C.* 535. *Aliter* where made after the presumption had arose, *Turner v. Crisp*, 2 *Str.* 827. An entry by the church-wardens of receiving a sum of money from the church-wardens of *B.* by virtue of a custom, admitted as evidence for *A.* against *B.* *Vide Glynn v. Bank of England*, 2 *Vex.* 38. *Outram v. Morewood*, 5 *T. R.* 121.

19. *Ford versus Grey.*[*Hill. 2 Ann. B. R.*]

What possession or entry will prevent the statute of limitations.
Mod. Cases 44.
S. C. Ford vers. Lord Grey,
6 *Mod* 44. *S. C.*
Post 423.

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Recital of lease and release is evidence, and against whom.
Vide Gilb. Law of Ev. per Lofft.
107.
Finefevers joint-tenancy. Jon.
55.

IN *ejectment* on a trial at bar, the statute of limitations was insisted on, and these points were ruled *per Cur.*

1st, That the possession of one joint-tenant is the possession of the other, so far as to prevent the statute of limitations (a).

2dly, That a claim or entry to prevent the statute of limitations must be upon the land, unless there be some special reason to the contrary.

3dly, If one makes an answer in Chancery which is prejudicial to his estate, it may be given in evidence against him, but not against his alienee.

4thly, That a recital of a lease in a deed of release is good evidence of such lease against the releasor, and those that claim under him; but as to others it is not, without proving there was such a deed, and it was lost and destroyed.

5thly, If one joint-tenant levies a fine, it severs the jointure, but does not amount to an ouster of his companion.

(a) So of tenants in common, *Fair-claim v. Shackleton*, 5 *Bur.* 2604. 1 *Bl.* 690. *Vide Doe v. Proffer, Cowp.* 217. cited *post* 423.

20. *Domina Regina versus Mackartney & al.*[*Mich. 2 Ann. B. R.*]

S. C. 6 *Mod.*
301, 311. *H.*
being cheated,
may be a witness

INDICTMENT for a cheat done to *J. S.*, by imposing upon him a quantity of beer mixed with vinegar and grounds of coffee, for *Port* wine; one of the defendants

feudants pretending to be a broker, and the other a *Portuguese* merchant, for the better carrying on of the cheat. *Et per Holt, C. J., J. S.* was allowed to be a witness to prove the fact upon the trial, for in such private transactions nobody else can be a witness of the circumstances of the fact, but he that suffers (a).

to prove the fact on the indictment. *Far. 119.* Ante, pl. 12. *Far. 129.* 1 *Sid.* 431. 2 *Keb.* 572. *Hard. 332.* 1 *Vent.* 49, 78.

Holt 300. 2 *Ld. Raym.* 1179. 4 *Bur.* 2252.

(a) *Vide* note to *Rex v. Whiting*, ante, pl. 12.

21. Tilley's Case.

[*Mich.* 2 *Ann. C. B.* 2 *Ld. Raym.* 1008. *S. C.*]

ON a trial at bar in *C. B.* this point arose, viz. Depositions had been taken in Chancery *in perpetuam rei memoriam*, and it happened afterwards that the inheritance of the same land descended to the person who was sworn as a witness, and he was now a party to the suit in ejectment; and the question was, Whether these depositions could be read in the cause? *Trevor, C. J.* held, that they ought; for that he was disabled to give evidence by the act of God; so that it was in effect the same thing as if he were dead. *Tracy* and *Blencow contra*. Hereupon *Tracy* came into *B. R.* to ask the opinion of the Court, and the Court agreed they ought not to be read; for *per Holt, C. J.* The only intent of such depositions was to perpetuate testimony, in case the witnesses died, and they cannot be read in any case between other parties till after the death of the witness, who is to appear and give his evidence *vivus voce*, so long as he lives: Much less can they be read in this case, where the witness himself is party. To which *Trevor, C. J.* agreed (b).

Depositions in *perpetuam rei memoriam*, are not evidence in any case as long as the witnesses live. Ante 272. *Vide* 1 *Atk.* 445. *Sho.* 363. *Str.* 920. *Barnard. B. R.* 348.

Vide Lilly's 8th part, Reg. 388. 2 *Salk.* 555. 691. 5 *Mod.* 99. 163, 277.

(b) Depositions taken fifty years before not allowed to be read, without some evidence that the witness was dead or could not be found, *Benson v. Olive*, 2 *Str.* 920. But where a witness has been sought for and could not be found, or was subpoenaed and fell sick by the way, his depositions may be used, *Bull. N. P.* 239. In *Baker v.*

Ld. Fairfax, 1 *Str.* 101. on an issue out of Chancery, the depositions of a witness, who became interested after they were taken, were not allowed to be read, but the depositions were, under similar circumstances, admitted in Chancery in *Goff v. Tracy*, 1 *P. Wms.* 287. *Callow v. Mime*, 2 *Vern.* 472. *Hawes v. Hand*, 2 *Atk.* 615.

22. *Martyn versus Hendrickson.*

[Hill. 2 Ann. *Coram* Holt, C. J. *At nisi prius, at Guildhall.*
2 *Ld. Raym.* 1007. S. C.]

Evidence in an action for running over the plaintiff's barge with his ship.

Ante 283. *Holt* 756. S. C. *Bull. N. P.* 289.

2 *Str.* 1083.

4 *T. R.* 589.

Declaration must set forth the goods injured.

4 *Bur.* 2455.

3 *Co.* 38. 2 *Str.*

637. 2 *Ld.*

Raym. 1410.

Vide also 3 *Will.*

292.

IN an action on the case for managing the defendant's ship so negligently, that it ran over the plaintiff's barge, the declaration set forth that he was possessed of the said barge, laden with divers goods and merchandizes: And, 1st, *Holt*, C. J. would not suffer the pilot to be a witness, because he was answerable, if faulty in steering, to the master. 2dly, He would not suffer any damages to be recovered for the goods, because not set forth particularly, saying, they ought to be set forth specially, as where an action is brought for burning his house: So in case for words, *per quod* she lost her marriage with *J. S. & alia personis*, he said he would not suffer them to give in evidence a loss of marriage with any body but *J. S.*

23. Anonymous.

[*Mich.* 3 *Ann. B. R.*]

Counterpart is not evidence, unless old, or in case of a fine.

1 *Lev.* 25. *Mod.*

Cases 225, 248.

2 *Salk.* 690.

Far. 129. 3 *Keb.*

477. *Holt* 301.

S. C. 12 *Vin.*

104.

PER *Holt*, C. J. In a case in my Lord *Hale's* time, between *Combe* and *Mayo*, a counterpart of an ancient deed was admitted as evidence of the deed, and the special verdict was drawn up as finding the deed with a *prout patet* by the counterpart, which he said was done to preserve the precedents; and now by all the Court, the counterpart of a deed, without other circumstances, is not sufficient evidence, unless in case of a fine, in which case a counterpart is good evidence of itself (a).

(a) *Per* *Ld. Hardwicke*, 2 *Atk.* 71. the rule of evidence is, that the best evidence the circumstances of the case will allow must be given. If an original deed is lost, the counterpart may be read; and if there is no counterpart

forthcoming, then a copy may be admitted; and even if there should be no copy, there may be parol evidence of the deed, and the manner of its being lost. *Vide* *Ambler* 247.

24. *Watson versus Sparks.*

[*Mich.* 5 *Ann. B. R.*]

In trespass on not guilty, the defendant cannot give evidence

IN trespass *quare clausum fregit*, not guilty was pleaded, and on trial the defendant gave evidence, that it was in a highway. *Et per Cur.* † It is a special justification, and

† *Nota.* In the case of the *Duchess of Marlborough v. Grey*, November 27, 1728.; upon a motion for a new trial, (where such evidence had been allowed

and ought not to be allowed to be given in evidence on the general issue. *Holt*, C. J. said, In case for disturbing the plaintiff of his common, upon not guilty pleaded, he had known the defendant permitted to give in evidence, that he had a right to common there; but he never thought it right, and never allowed it.

allowed in trespass) this case of *Watson v. Sparks* was much relied upon by the plaintiff; but it was observed by the Court, and those who had notes of this case, that it was not per Curiam, but only a saying of C. J. Holt, and the constant practice in the circuits has been to admit this evidence on the general issue.—*Note to the 5th edition.*

25. *Charnock's Case.*

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CHARNOCK was indicted, for that he the 10th of February, 9 Will. 3., & diversis aliis diebus & vicibus tam antea quam postea, in the parish of St. Clement Danes, did traiterously conspire to kill the king. *Et per Holt*, C. J. Evidence may be given of a treasonable conspiracy, &c. at any time before or after the time alleged in the indictment:

1st, Because it is only a circumstance, and of form: Some day must be alleged, but it is not material.

2dly, The indictment lays it to be at divers days and times, as well before as after, and thereby comprehends what was done last year, as well as this; and as the evidence may be of matters before that time, so it may be of matters also at any time after the time specified in the indictment, provided it be not after the time the indictment was found; neither is the evidence tied up to the place; for it may be of any place, provided it be not out of the county; and so it is of all criminal cases. *Vide Charnock's Trial*, fo. 19. &c.

On indictment, evidence may be of the fact done at any time, not after the indictment, and at any place in that county. 3 Salk. 81. S. C. *Holt* 133, 301, 681. Post 631. 3 Inst. 230. *Kelynge* 16. 4 St. Tr. 9. 9 S. T. 587. *Foster* C. L. 7, 8. Co. Lit. 303. a. 5 Co. 120, 121. *Long's case*. 2 Hale 163. 2 Hawk. c. 25. sect. 35. et seq. ch. 46. sect. 33, 34. Doug. 792. (760.)

26. *Wright versus Sharp.*

[Pasch. 7 Ann. B. R.]

A Corporation-book was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused. No bill of exceptions was then tendered, nor were the exceptions reduced to writing; so the trial proceeded, and a verdict was given for the plaintiff. Next term the Court was moved for a bill of exceptions; and it was stirred and debated in court. It was urged, that the law requires *quod proponat exceptionem suam*, and no time is appointed for the reducing it into writing, and the party

Bill of exceptions must be tendered at the trial. *Mod. Cases* 78. 2 Inst. 427. F. N. B. 21. N. Rep. A. Q. 175. S. C. *Holt* 301. Sir T. Raym. 405. Bull. Ni. Pri. 315.

is not grieved till a verdict be given against him ; and the same memory that serves the judges for a new trial will serve for bills of exceptions. *Vide 2 Inst. 437. N. B. 21. 540. b. Vet. Intr. 96, 136. Raymond 405. Brownl. Red. 433. 2 Lev. 236. Stat. West. 2. c. 31.* On the other side it was said, that this practice would prove a great difficulty to judges, and delay of justice ; that the precedents and entries suppose the exception to be written down upon its being disallowed, and the statute ought to be construed so as to prevent inconvenience ; besides, the words of the act are in the present tense, and so is the writ formed on the act. *Holt, C. J.* If this practice should prevail, the judge would be in a strange condition : He forgets the exception, and refuses to sign the bill, so an action must be brought : You should have insisted on your exception at the trial : You waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point : The statute indeed appoints no time, but the nature and reason of the thing requires the exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence ; not that they need be drawn up in form ; but the substance must be reduced to writing while the thing is transacting, because it is to become a record : So the motion was denied.

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27. *Hern versus Nichols.*[*Coram Holt, C. J. At nisi prius.*]

Deceit of the factor beyond sea, evidence to charge the merchant in an action of deceit. *Brook Action sur le Cafe, pl. 8. con. Ante 272. Holt 462. S. C. 1 Rol. 95. 2 Cro. 471. Str. 653. 3 Atk. 47. 1 T. R. 12.*

IN an action on the case for a deceit, the plaintiff set forth, that he bought several parcels of silk for ——— silk, whereas it was another kind of silk ; and that the defendant, well knowing this deceit, sold it him for ——— silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant who was the merchant, but that it was in his factor beyond sea : And the doubt was, If this deceit could charge the merchant ? And *Holt, C. J.* was of opinion, that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter* ; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger : And upon this opinion the plaintiff had a verdict.

2 Moore 125

B. Ald. 157.

167.

28. Anonymous.

[*Coram Holt, C. J. At nisi prius.*]

IN *trover* for money the case was upon evidence, that the plaintiff's son had a general authority from his father to receive and pay out his father's money. The son took a bill for money due to his father, and received it without a particular authority for that purpose, and this receipt was with an intent to embezzle and spend it; but he gave a receipt as for money had to his father's use, and this money was given to the defendant. The questions were, 1st, If the son could be a witness in this case to prove the delivery? And, 2dly, Whether the father could maintain an action of *trover*? *Holt, C. J.* was of opinion, that the son might be admitted as a good witness, his testimony being corroborated by other circumstances; and that the action was maintainable for the father, for that the general authority that the son had to take his father's money, made the receipt of the money to be to his father's use, and a good discharge of the debt, so as that the father could not avoid the payment, and charge the person that paid the money with an action; and then, if the payment was a good discharge, it is reason it should be his money, and the possession of the son is the possession of the father, the son being to this purpose as his father's servant; and according to this opinion the plaintiff had a verdict, but he said he was willing to have a case made of it; but the defendant acquiesced in his opinion (a).

Son took the father's money and gave it to H. and the son's evidence admitted in *trover* against H. 1 Sid. 431. Far. 129. 1 Mod. 30. 1 Lev. 282. Mod. Cases 291, 301, 311.

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1 Vent. 52.
1 Sid. 438.
2 Keb. 588.
2 Salk. 655.

(a) *R. acc. Cowp.*, 198. That an action lay against a lottery-office-keeper for money which he received from a servant who had embezzled it, and that the servant (having a release) was

admissible as a witness. In *trover* against a pawnbroker, the servant embezzling his master's goods, and pawning them, will be admitted to prove the fact, *Bull. N. P.* 290.

29. *Brown versus Hedges.*[*Trin. 7 Ann. B. R.*]

IN *trover*, upon not guilty pleaded it appeared in evidence, that the defendant was tenant by the curtesy of lands in *Ireland*, and had cut down and sold the trees off the estate, and that the reversion belonged to the plaintiff and two others in coparcenary. Upon a case made for the opinion of the Court, it was resolved, 1st, That in local actions, as in *trespass quare clausum fregit*, the plaintiff cannot prove a trespass but where he lays it, nor lay it in

Declaration of a *trover* in *Middefex*, and proof of one in *Ireland*, good. Mod. 466. Cro. Eliz. 554. 1 Sid. 49. 1 Mod. 102. 4 Mod. 176. Carth. 249.

any

Kitch. 230.
2 Mod. 270.
Cro. El. 667.
Co. Lit. 282. b.
Com. Dig.
Action, N. 12.
One joint-tenant, &c. cannot bring trover against his companion, but may against a stranger, and it is only pleadable in abatement. Skin. 12, 180. 4 Mod. 181. Com. Dig. Abatement E. vol. 1. 3d edit. pa. 16. 1 T. R. 658. Cowp. 450.

East
420

See 4 East 121 when a joint
plaintiff brings trover &c
and 241.

any other place than where it is ; but it is otherwise in actions transitory, as trover: *Ergo*, here he may lay the conversion here, and prove it in *Ireland*. *Vide Style* 331. 2dly, One joint-tenant or tenant in common, or parcener, cannot bring trover against another, because the possession of one is the possession of both ; if he does, it is good evidence upon not guilty : But if one joint-tenant brings trover against a stranger, in that case the defendant may plead it in abatement, but cannot take advantage of it in evidence. 2 Lev. 113. Cro. El. 544. 5 East 420—

30. Blackham's Case.

[Hill. 7 Ann. Coram Holt, C. J. *At nisi prius in Middlesex.*]

Sentence of the Spiritual Court in a cause within their jurisdiction, is conclusive evidence in the point tried ; otherwise of a collateral matter. 2 Wilson 25, 124, 125, 127, 128, 129. 2 Mod. 231. 3 Bro. P. C. 348. Harg. Law Tracts, 451. Harg. St. Tr. vol. 11. p. 262. Bull N. P. 244. Str. 961. Rep. B. R. Temp. Hard. 18.

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1 Ves. 159.
Cowp. 315.
3 T. R. 639.
Com. Dig. Evid.
C. 1. 4th vol.
3d edit. pa. 95.
1 Lev. 235, 236.
1 Sid. 359.
Raym. 405.
2 Keb. 357.

IN trover upon evidence at a trial before Holt, C. J., at the sittings in *Middlesex*, the case was, The plaintiff proved the goods to be in his possession, and to be taken away by the defendant. The defendant shewed that these were the goods of *Jane Blackham* in her life-time, and that the defendant had taken out letters of administration to her, and so was entitled to the goods. Upon this the plaintiff proved, that, some few days before her death, she was actually married to him. And in answer to that it was insisted, that the Spiritual Court had determined the right to be in the defendant ; for they could not have granted administration to the defendant, but upon supposing there was no such marriage, and that this sentence being of a matter within their jurisdiction, was conclusive, and could not be gainsaid in evidence. *Et per Holt, C. J.* A matter which has been directly determined by their sentence cannot be gainsaid (a) : Their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary ; but that is to be intended only in the point directly tried ; otherwise it is if a collateral matter be collected or inferred from their sentence, as in this case, because the administration is granted to the defendant, therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point there tried had been married or unmarried, and their sentence had been, not married.

(a) *R. acc. 7 Bro. P. C. 414. Vide 7 Bro. Par. Ca. 319.*

31. Lady Dowager Lindsey *versus* Lord Lindsey.

[Mich. 8 Ann. B. R.]

IN *ejectment* the plaintiff made title by a recovery in dower, and produced in evidence the record of the judgment, the *habere facias seisinam*, &c. The defendant offered to prove a term of ninety-nine years subsisting, and that prior to this title, but it was disallowed; for if he had pleaded this in bar of the writ of dower, yet the plaintiff must have recovered with a *cesset executio*; and the defendant had a proper time to have pleaded it then, and has slipped his opportunity: Also a chattel-interest was at common law bound by a recovery in a real action, so that the defendant had an (a) *intermediate* execution, without regard to the subsisting term: And though by the statute H. 8. a termor may falsify, yet it must be the termor himself, and not another for him (b).

Ejectment; title, recovery in dower; defendant offered to prove a term of years prior to the title of dower, and disallowed. Lut. 733. Ante 254, 276. 1 Leon. 92.

(a) This should be immediate *come semble*.

(b) The following is an extract from Mr. Butler's note to *Co. Lit.* 208. a. "At common law, if a lease be made for a term of years, rendering rent, the wife is entitled to her dower of a third part of the reversion by metes and bounds, and to a third part of the rent; and execution will not cease during the term. 2dly, If the husband makes a gift in tail, as the rent is payable out of, or in respect of, an estate of inheritance, the wife will be endowed of a third part of the rent. 3dly, If the husband makes a lease for life rendering rent, the wife is not entitled to her dower of the rent, because it is not payable, in this case, out of, or in respect of, an estate of inheritance. 4thly, If the husband makes a lease for years, reserving no rent, then judgment will be given for the wife with a *cesset executio* during the term. This, if the term be of long duration, de-

prives her virtually of her dower. 5thly, If a person purchases an estate of inheritance which is in mortgage for a term of years, whether he only purchases the equity of redemption or discharges the mortgage, the wife of the vendor will not be entitled to her dower in equity. 6thly, If a person disseised in fee, subject to a term of years, if the term be in gross, for securing the payment of a sum of money, the widow, by discharging the money secured by it, or paying one-third of the interest, will be entitled to dower. 7thly, If the term be an outstanding satisfied term, she will still be entitled to her dower against the heir. *Co. Lit.* 32. a. *Bro. Abr. Dower* 44, 60, 89. 1 *Rel. Abr.* 678. *Bodmin v. Vandebendy*, *Shaw. Ca. Par.* 69. *Brown v. Gibbs*, *Precc. Ch.* 97. *M'ray v. Williams*, *ibid.* 151. *Dudley v. Dudley*, *ibid.* 201. *Banks v. Sutton*, 2 *P. Wms.* 700. *Hill v. Adams*, 2 *Aik.* 208."

32. Savage's Case.

[*Coram* Trevor, C. J. *At nisi prius*.]

IN *assumpsit* upon a note for 10 l. 15 s. given by the defendant to the plaintiff, and *non assumpsit* pleaded, upon trial the plaintiff produced and proved the note. The defendant

Condemnation after original, in foreign attachment brought

before original, is a discharge on non assumpsit. Vide ante contra, 280. pl. 6. Vide also *Ld. Raym.* 180, 727. *Bl.* 834. 3 *Willf.* 2, 7.

defendant in discharge of himself produced the record of a foreign attachment, wherein the said debt was attached by the city-process for the satisfaction of a debt demanded there of the plaintiff, and was there condemned: And it was ruled by *Trevor, C. J.* that this was a good discharge; but that if the plaintiff in this action could have shewed the original, wherein he declared, to be precedent to that attachment, so that it had appeared that this Court was possessed of an action for the demand of this debt before it was attached, then should the plaintiff have recovered his debt notwithstanding such evidence; but the declaration in the record here was betwixt the time of the attachment and of the condemnation.

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33. — *versus* Layfield & al.[*Coram* Holt, C. J. *At nisi prius.*]

Where the plaintiff goes upon the credit of both partners, the act of one is evidence against the other, unless he shews a disclaimer. 3 *Lev.* 558, 359. 3 *Mod.* 322. *Palm.* 283, 284. *Cro. Jac.* 411. *Br. Joinder in Action* 47. *Lat.* 62.

IN an action on the case for money had and received to the plaintiff's use, it appeared upon evidence, that *Layfield* and the other defendants were bankers and partners, and that the plaintiff had given *Layfield* 20 s., for which he received a ticket in the double exchange lottery, and *Layfield* undertook to pay what benefit should happen thereupon: That the ticket came up a 40 l. benefit, and for that money the action was brought; and it was objected for the defendants, that the action was brought against *Layfield* and his partners, and it did not appear that any had undertaken to be trustees in the lottery but *Layfield*, and therefore he only ought to be charged, and not his partners; to which *Holt*, Chief Justice, answered, that it appeared they were partners in their trade, and goldsmiths, and the adventurers put their money in upon the credit of several goldsmiths that had undertaken to pay the benefits, and it should be presumed the act of *Layfield* was the act of the other, and should bind them, unless they could shew a disclaimer, and a refusal to be concerned in it; and accordingly the plaintiff had a verdict for forty pounds (a)

Vide plus, Title Witnesses.

(a) A dormant partner is universally allowed to be answerable on all contracts relative to the partnership account. In order to constitute a co-partnership, there must be joint concern both in buying and selling. Where a partner on retiring from trade was to let a sum of money remain in the hands of the other partner for seven years, and to receive legal in-

terest, and also an annuity of 100 l., it was deemed no copartnership; and the party withdrawing was not liable to debt afterwards contracted. *Grace v. Smith.* 2 *Bl.* 998. But it was ruled otherwise, where a partner on retiring was to leave a sum of money at legal interest, and to receive an annuity for six years if the other partner so long lived, as in lieu of the profits

profits of the trade, and was to have liberty to inspect in the books. *Bloxham v. Pell*, cited *ibid.* Where a broker was employed to buy tea for several persons, and bought a large lot from the *East India Company*, to be afterwards divided amongst himself and the others; and received a warrant for delivery of the tea, which he pledged for a sum of money that he borrowed; the other purchasers were adjudged not liable to an action for the money so borrowed. *Hoare v. Davies*; *Doug.* 371. So where one person was to buy a quantity of goods, and let others have a certain proportion of the purchase, they were not answerable as partners, though in making some purchases, they came forward as having a joint concern. *Coope v. Eyre* and others, *H. Bl.* 37. So where several persons agreed to make an outfit, and each adventurer was to purchase a quantity of goods and bring

it into the common stock; the price of a parcel of goods so bought was held an individual debt, which could not be recovered from the other adventurers. *Saville v. Robertson*, 4 *T. R.* 720.

Vide Pinkney v. Hall, ante 126. — *A.* and *B.* being partners, *A.* received money in the shop of *C.*, and gave a note for it signed by himself and partner; the partners being dead, both their executors were held liable. *Lane v. Williams*; 2 *Vern.* 277. 292. 1 *Eq. Ca. Ab.* 370. The true criterion whether the act of one partner makes the others responsible, seems to be, Whether the act was or was not done according to the usual course of business? That point was admitted in a cause in the sittings after *Michaelmas* 1792.

Each partner has a power singly to dispose of the whole of the partnership effects. *Fox v. Hanbury*, *Coop.* 444. *Vide* 2 *Bro. P. C.* 323.

Excommunicato Capiendo.

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1. King *versus* Fowler.

[*Mich.* 12 *Will.* 3. *B. R.* 1 *Ld. Raym.* 618. *S. C.* 12 *Mod.* 418. *S. C.*]

ON a *habeas corpus* the return was, that *Fowler* was taken and in custody by a writ of *excommunicato capiendo*, and the excommunication was in the writ recited to be *pro quibusdam causis subtractionis decimarum sive aliorum jurium ecclesiasticorum*; and because this return was uncertain, the Court was moved that he might be discharged; and the question was, Whether this return was uncertain, and whether that uncertainty would vitiate the writ, &c. ? And the Court resolved,

1st, That the return was uncertain; for that the *alia jura* might be such matters as were out of their jurisdiction, and they ought to shew the matter was within their

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jurisdiction;

Vide 350. *excommunicato capiendo* pro quibusdam causis subtractionis decimarum sive aliorum jurium ecclesiasticorum, quashed for uncertainty. *Faz.* 57. 5 *Co.* 20. 21. *Strange*, and *Rep. B. R.* *Temp. Hard.* ubi *infra*.

jurisdiction; for of that the King's Courts are to be judges and not they themselves.

Cause must be expressed in the writ since the stat. 5 Eliz. 2 Inst. 660, 661. 3 Mod. 89. Cro. Jac. 560, 567. 2 Atk. 498. Com. Dig. Excom. B. 3. 3d. ed. vol. 4. p. 108. Str. 43, 76.

2dly, The cause of excommunication must be set forth in the writ. At common law the writ *de excommunicato capiendo* was always general *pro contumacia*, not containing a special cause: and the writ was returnable in Chancery, and founded on a *significavit* or certificate of the bishop, which certificate set forth the cause before, and the party could not be discharged but by *superfedeas* in Chancery, if the cause were insufficient: But now the cause must be set forth in the writ *de excommunicato capiendo* itself, because by the stat. 5 Eliz. the writ is made returnable in this court, which could be to no purpose, if the cause were not to be set forth in the writ, and this Court judge of that cause.

Cro. Jac. 272. pl. 5. Post. 294. Str. 43. Rep. B. R. Temp. Hard. 314. Str. 946. 1067.

3dly, The Court held they might discharge the party upon the insufficiency of the return: Before the 5th Eliz. there were no discharges in this court on *excommunicato capiendos*, but where a man was excommunicate pending a prohibition: Now the case is altered, for this Court may quash the writ of *excommunicato capiendo*, or award a *superfedeas*, because this Court are judges of the cause and have it before them, and the party cannot go into Chancery for a *superfedeas* now, because the writ is returnable here (a).

Andrews, 220.

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* Accordingly the writ was quashed, and this special entry made on the *habeas corpus*, viz. That the party was discharged, because the writ *de excommunicato capiendo* was quashed.

(a) R. acc. 3 Atk. 479.

2. Domina Regina versus Hill.

[Pas. 13 Will. 3. B. R.]

Far. 58. Ante pl. 1. 3 D. 296. p. 5. S. C. Cases B. R. 517. 1 Ld. Raym. 618. Vide the references to the preceding case.

IN a writ of *excommunicato capiendo* the recital of the *significavit* was, That he was excommunicated for not paying the costs in *quodam negotio querorum educationis sive instructionis sine aliqua licentia in ea parte prius obtenta*; and the writ was quashed for uncertainty, because it might be a teaching to fence or dance, and not letters.

3. *Domina Regina versus* The Bishop of St. David's.

[Mich. 1 Ann. B. R.]

THE defendant was taken upon a writ of *excommunicato capiendo*, and being in custody in *Newgate* prayed a *habeas corpus*, and was brought into court thereupon, and it appeared by the return, that the writ of *excommunicato capiendo* was not yet returnable; and the Court held, 1st, That one taken on a writ of *excommunicato capiendo* cannot come into this court but by *habeas corpus*; † and if he be brought in before the writ is returnable, he shall not be allowed to plead or move to quash the writ (a).

Ante 106, 134.
H. taken on excommunicato capiendo cannot come into B. R. but by habeas corpus, and that not before the return of the process. Far. 56. 117. Mod. Cases, &c. 160. Ante 114, 115. F. N. B. 67. † May be bailed by stat. 5 Eliz. 1 Sid. 181.

2dly, The writ of *excommunicato capiendo* recites the *significavit*, which is in Chancery, but the writ is brought into this court, and is inrolled here before it goes to the sheriff; which inrolment is to inform the Court, that at the return of the *excommunicato capiendo*, they may award farther process, as the case requires.

2dly, If by the recital of the *significavit* it appears that there was no cause for the writ, the court of King's Bench may quash it, and the court of Chancery cannot, though the *significavit* be there (b).

Ante pl. 1.
2 Ld. Raym. 817. S. C.

(a) *R. contr. Str.* 43.

(b) *R. acc. 3 Atk.* 479.

4. *Domina Regina versus* Sangway.

[Mich. 1 Ann. B. R.]

THE defendant was excommunicated *pro quadam causa justitiationis maritogii*, and taken upon a *capias* with penalty, and brought up by *habeas corpus*; and Mr. Cheshire took two exceptions to the writ: 1st, That this not being one of the nine causes mentioned in 5 *Eliz.* c. 23. no penalty ought to have been in the writ. 2dly, That no addition was given the defendant: and the Court held, that for any of the nine causes mentioned in the statute there ought to go a *capias* with a penalty, and be an addition in the writ; but in other cases no addition was necessary; and though there was a penalty, yet the Court would not discharge the party of the process, but discharge the penalty only; though the law was taken to be otherwise heretofore: But that for the want of addition in cases where that was necessary, the party should be discharged upon motion.

Far. 22. 3 D. 294. P. 7. S. C.

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Vide 1 Lill. 561.
Cro. Car. 197.
109. Latch. 174.

Executors.

1. King *versus* Ayloff.

[Trin. 1 W. & M. B. R.]

Executor may
bring error to re-
verse the attain-
der of testator.
1 Leon. 325.
Owen 147.
5 Co. 111. a.
1 Roll. 512.
Godb. 377.
380. 1 Shew.
23. S. C.
Comb. 114.
3 Mod. 72. Holt. 304. Tiern. 12.

EXECUTOR brought a writ of error to reverse an attainder of high treason of his testator, and *Holt, C. J.* doubted whether it lay for the executor; for by reversal the blood and the land is restored, which is of no advantage to him, and the goods were forfeited by the conviction of the testator, and not by the attainder: But the other three justices against him; for he is privy to the judgment, and may have loss thereby. *Vide 3 Cro. 225, 273, 558.*

2. Whitehall *versus* Squire.

[Pasch. 2 W. & M. B. R.]

3 Mod. 276.
Administrator
cannot bring
trover for a
chattel after his
consent to the
defendant's hav-
ing it, before
administration
granted. Q.
Carth. 103. S.
C. 3 D. 373.
p. 3. S. C. Skin.
274. 3 Salk.
161. Holt 45.

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IN an action of *trover* by the plaintiff as administrator of *J. M.* for a gelding, on not guilty pleaded the jury found a special verdict, *viz.* That *J. M.* was possessed of the gelding, and put him to the defendant to pasture, and died intestate: that, before administration granted, the plaintiff desired the defendant to bury *J. M.* decently, who accordingly buried him, and laid out 23 *l.* therein; whereupon the plaintiff agreed, that the defendant should have the horse in part of satisfaction of funeral charges, and for 13 *l.* residue thereof gave him his note; afterwards the plaintiff took out administration, and now brought trover for the horse; and *Holt C. J.* was of opinion, that the action well lay; for that the defendant was a tort executor, and the plaintiff's consent, when he had nothing to do, would not alter the case; for if he had then released, yet he might have taken administration, and brought an action afterwards; but *Dolben* and *Eyre*, justices, *contra*, and the defendant had judgment.

3. Shelly's Case.

[Trin. 5 W. & M. B. R.]

IN an action upon the case against an executor, upon *plene administravit* pleaded, three points were declared *per Holt, C. J.* 1st, That the plaintiff must prove his debt, otherwise he shall recover* but *1d.* damages, though there be assets, for the plea only admits a debt, but not the quantity. 2dly, That all separate debts mentioned in the inventory shall be counted assets in the executor's hands; for that is as much as to say that they may be had for demanding, unless the demand of refusal be proved (a). 3dly, That for strictness no funeral expences are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees, but not for pall or ornaments (b).

Evidence upon plene administravit. Show. 81. Cro. El. 315. pl. 9. 1 Lill. 574. Cro. El. 575. Plowd. 543. 2 Roll. Abr. 926. f. 1. Holt 305. S. C. Comb. 342.

(a) If, in the inventory produced, the article concerning debts did not distinguish between separate and desperate, it would be sufficient to charge the executor with the whole, *prima facie*, as assets, and put it upon him to prove any of them desperate. *Smith and Davis, per Ld. Hardwicke, Bull. Ni. Pri.* 140.

(b) *Per Ld. Hardwicke, Stag v. Punter, 3 Atk.* 119. "At law, when a person dies indebted, the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40s., then 5*l.*, at last 10*l.*; but a court of equity is not bound down by such strict rules, especially when a testator leaves great sums in legacies,

which is a reasonable ground for an executor to believe an estate is solvent." In the case cited he allowed 60*l.*, as the testator had directed his corpse should be buried at a church thirty miles distant from the place of his death.

In the case of *Offley v. Offley, Prec. Ch.* 27., 600*l.* had been laid out in Mr. Offley's funeral, (whose personal estate was insufficient for payment of his debts,) which the Court allowed, he being a man of great estate and reputation in his country, and buried there; but this was not *come sembla* against creditors. *Vide Bull. N. P.* 143.

v. *110 adid 260 - now £20.*

4. Harding versus Salkill.

[Mich. 5 W. & M. B. R.]

IN debt against the defendant as executor, the defendant pleaded in bar, that he was administrator; relying upon *Dyer* 305. pl. 61. But the Court held it no plea in bar; for if an action be brought against an administrator by the name of executor, and judgment had therein, this judgment may be pleaded in bar to another action brought against him as administrator.

S. C. Comb. 220. Skia. 365. Holt 306.

Post pl. 8. Debt against executor, that he is administrator, is not in bar but abatement. 2 Lev. 190. Styl. 385. 1 Mod. 239. 3 D. 384. p. 18. Calcs B. R. 46.

5. *Newton versus Richards.*

[Pasch. 6 W. & M. B. R. Rot. 67. 1 Ld. Raym. 3. S. C.]

4 Mod. 296.

Scire facias on a judgment against the testator.

Plene administravit without shewing how, is ill on special demurrer. Raym. 231. Cro. El. 575. 1 Lill. 568. Comb. 298. S. C. Skin. 565.

Holt 45. Vide 3 Wms. 117. Offic. Ex. c. 9. pa. 138. ed. 1763.

SCIRE facias upon a judgment against the testator was now sued against his executor, who pleaded *plene administravit & nulla bona die impetrationis primi brevis de scire facias nec unquam postea*. The plaintiff demurred specially, and shewed for cause, that the defendant did not shew how he had administered, and had judgment; for against a judgment he ought to shew how he administered, but it had been good upon general demurrer. *Vide Mo. 158. All. 48. 3 Keble 258. 2 Keb. 736. 3 Cro. 575.*

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6. *Billinghurst versus Speerman.*

[Pas. 7 Will. 3. B. R.]

1 Sid. 200, 266.

In debt for rent, executor may plead no assets, and that the premises are of less value than the rent. 1 Vent.

271. Vide post 307, 317.

2 Vent. 209.

210. 1 McD.

185, 186. Rep.

A. Q. 169. S. C.

Holt 306. 5 Co.

31. Cro. Eliz. 711. 3 Lev. 74.

IF an executor has a term, and the premises are of less value than the rent reserved thereon, in an action brought against him in the *debet* and *detinet*, he may plead the special matter, *viz.* That he has no assets, and that the land is of less value than the rent; and demand judgment if he ought not to be charged in the *detinet tantum*. This Holt, C. J. said was his opinion, and that Hale was of the same opinion, and it was but reasonable, because an executor could not waive for the term only; for he must renounce the executorship *in toto* or not at all.

7. *Williams versus Grey.*[Pas. 7 Will. 3. B. R. *Vide* this case in title *Action sur le Case*, pl. 2. pag. 12.]8. *Fooler versus Cooke.*

[Mich. 7 Will. 3. B. R.]

Ante pl. 4. Post

pl. 9. Action

against executor,

plea that he is

administrator,

need not traverse

PLAINTIFF brought *assumpsit* against the defendant as executor; defendant *petit judicium si ipse ad billam prad. respondere debeat quia dicit*, That administration was granted to him, in which case he ought to be sued as administrator, and not as executor, and concludes *petit judicium*

dicium si ad billam predict. respondere compelli debeat, &c. The plaintiff demurred, and it was objected, first, That he had not traversed, *absque hoc* that he administered as executor. 2 *Brownl.* 184. *Sed non allocatur*: For it is better without a traverse, and the plaintiff's declaration is well confessed and avoided; for an intermeddling with the goods entitles the plaintiff to an action against the defendant, and now he has shewed the cause of his intermeddling and upon what account, which, if true, he ought to be charged accordingly; it is true, if he intermeddled before administration, he may be charged as executor of his own wrong, but that shall not be intended; for all acts are intended to be rightful till the contrary appears; and if the case were so, the plaintiff ought to reply it: A traverse would be impertinent; for though the declaration supposes an intermeddling, yet it does not suppose how nor in what manner; and to deny an intermeddling as executor *de son tort*, is to traverse that which is not alleged. *Et per Holt, C. J.* The difference is between suing one as executor, as in this case, for then there needs no traverse, and suing one as administrator to *J. S.*, for then, if the defendant pleads he is an executor, he must go on and traverse *absque hoc* that the said *J. S.* died intestate; and the reason is, because, unless there was a dying intestate, no action can be brought against one as administrator, and to say he was made executor, is by implication only an answer to the dying intestate (a). adly, It was objected, that the bill could not be abated upon the conclusion of this plea, which was to the jurisdiction of the court, and not to the bill; and the Court inclined that every plea ought to have its apt conclusion, and that they ought not to abate the plaintiff's writ or bill in this case, because the defendant had not prayed it.

that he intermeddled before administration granted. S. C. 5 Mod. 136, 145. Carth. 363. Cases B. R. 83. Holt 307, 556. Joles v. Wolfe, Mich. 17 Geo. 2. B. R. 2 Vent. 180. Post 313, 298. Yelv. 115. 9 H. 6. 7. 7 H. 6. 13. 1 Mod. 239. Lut. 891. 4 H. 7. 14. Plea that he is an executor, must traverse the dying intestate. Comyns 156. 1 Lut. 27. 5 Rep. 33. b.

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Ante 173, 211.

Proper conclusion in abatement. Com. Dig. Abatement, l. 12. 1 vol. 3d ed. pa. 90.

(a) *R. acc. Limden v. Bessingham, Com.* 155. where the plaintiff sued as administrator, and the defendant pleaded that the deceased made a will, which

was proved after administration granted, but did not traverse the dying intestate.

9. Powers versus Coot.

[Trin. 9 Will. 3. B. R. 1 Ld. Raym. 63. S. C.]

THE plaintiff brought *debt* upon an obligation against the defendant as executrix of *J. S.* The defendant pleaded that *J. S.* died intestate, and that administration was committed to her, & *per. judicium si ipsa ad billam predict. respondere debeat, &c.* Upon this the plain-

Carth. 363. Bowes v. Cook, ante pl. 8. 5 Mod. 136, 145. Debt against executor of *J. S.* Plea

that J. S. died intestate, and he is administrator, he need not traverse that he intermeddled before administration granted. 3 Bulstr. 250. S. C. 3 D. 414. p. 2, 3. 5 Mod. 136, 145. Cases B. R. 83. Holt 397, 556.

tiff demurred, and insisted that the defendant should have traversed, *absque hoc* that she intermeddled before administration committed to her; for if she did, she made herself liable as a tort executrix; and cited 3 Cro. 566, 810. 102. 3 Leon. 197. Telv. 115. Brownl. 97. Holt, C. J. & Cur. Such a traverse had been ill; for such intermeddling is not alleged, and the defendant ought not to traverse that which the plaintiff doth not allege in his declaration (a).

(a) This seems to be the same case as the preceding. It is reported by Ld. Raym. as of *M. 7 Will. 3.*, by the

name of *Powers v. Cook*; and the variance of the plaintiff's name in *pl. 8.* was a mistake not unlikely to be made.

10. *Aston versus Sherman.*

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 263. S. C.]

Pleading of six judgments is a confession of assets for above five; and if the replication takes issue upon the *riens ultra* a certain sum, it is ill. Post 312. Comb. 444, 449. S. C. Carth. 429. Cases B. R. 153. Holt. 308. Lill. Entr. 158. 3 Lev. 311, 368. Ld. Raym. 678. Com. 205.

DEBT upon a bond against an executor; the defendant pleaded six several judgments for 100*l.* each, and that he had not assets *ultra* 10*l.* which was bound by them; the plaintiff replied severally as to five of the judgments, that were kept on foot by fraud, and prayed judgment for his debt and damages in the conclusion of each plea; and as to the sixth he pleaded that the defendant had assets *ultra* the 10*l.* sufficient, &c. *Et hoc petit quod inquiratur per patriam.* Et per Holt, C. J. it was adjudged, first, That the plaintiff may reply severally as to each, and that it is at his election to reply to all, or some, or any one of the judgments set up by the executor. But 2dly, That the plaintiff's replication is wrong in this, that he pleaded as to five judgments *per fraudem*, and as to the last, that he has assets *ultra*, concluding to the country; for when a man pleads six judgments, he confesses assets for above five, so that it is an allegation of what is already confessed, and driving him to an unnecessary issue thereupon; but because there are precedents this way, as 1 Saund. 336. the plaintiff had leave to discontinue, and afterwards amended on payment of costs (a).

(a) *Vide* the pleadings in this case, *Lilly's Entries*, 157.

11. Dominus Rex *versus* Sir Richard Raynes.

[Mich. 10 Will. 3. B. R. S. C. Ld. Raym. 361.]

A *Mandamus* issued to grant probate of the will; the ordinary returned, That the executor was an absconding person, *incapax*, &c. And this return was held insufficient; for that there is a will is admitted, and since the testator has thought the executor a proper person to be intrusted with his affairs, the ordinary cannot adjudge him otherwise upon a disability by the canon law, for that is not admitted here, but as far as it has been received from time immemorial; *per Holt*, C. J. and a peremptory *mandamus* was granted.

1 Barn. B. R. 280. And. 365. 2 Rol. 159. 3 P. Wms. 337. 1 Bl. Rep. 456. 3 Atk. 566. 2 Atk. 126.

1 Vent. 335. S. C. Ante 36. Ordinary cannot refuse probate to an executor, because *incapax*. Q. If non compos? 36. Carth. 457. 3 Salk. 162, 231. Cases B. R. 136, 205. Holt 320. Sir. 857. Fitz. 125.

Neither can the ordinary insist upon security from the executor; for the testator has thought him able and qualified, and he has a temporal right which he cannot sue for before probate; and there have been no precedents nor practice of this nature.

Show. 294. S. C. Carth. 457.

12. Wankford *versus* Wankford.

[Intr. in C. B. Mich. 11 Will. 3. Rot. 311, 312, & Intr. in B. R. Hill. 1 Ann. Rot. 484.]

IN an *action of debt* upon two bonds, one for 240*l.* dated 1st Nov. 24 Car. 2. and the other for 800*l.* dated the 10th of January the same year, by *Elizabeth Wankford*, widow, administratrix with the will annexed of *Thomas Shelly*, against *Robert Wankford*, son and heir of *Robert Wankford* the obligor, by which bonds the obligor bound himself and his heirs, &c. The defendant prayed *oyer* of the letters of administration, and therein appeared the will of *Thomas Shelly*, in which was this clause: *And I do hereby ordain and make the said Robert Wankford my son-in-law* (who was the obligor) *full and sole executor of this my last will, to pay my debts and legacies*; and after the *oyer* of letters of administration pleaded in bar, that *Thomas Shelly* the obligee, the 13th of July, 30 Car. 2. made his will, and *Robert Wankford*, the obligor in the said bonds, his executor, and afterwards, *viz.* the 20th of July the same year died, after whose death *Robert* the obligor took upon him the burden of the execution of the said will, and administered divers goods and chattels which were the testator's at the time of his death, and afterwards, the 17th of August 1686, *Robert* the father made his will, and made the plaintiff his executrix, and afterwards the same day

Vide 2 Bl. Com. ch. 32. Obligor is made executor to obligee, and administers some of the goods, but does not prove the will, and dies. The debt is extinguished, and the administrator cum testamento annexo can have no action for it. 3 D. 418. p. 90. S. C. 3 Salk. 162. Rep. A. Q. 38. Holt 311. Vide Butl. Co. L. 264. n. 1. 5 Bro. Par. Ca. 217.

g B.R. 190. 2 a.

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day died, after whose death the plaintiff took upon her the burden of the execution of the last-mentioned will, and proved it long before the grant of administration above set forth; the plaintiff replied *protestando*, That the defendant's plea is insufficient for want of alleging that *Robert* the obligor proved *Shelly's* will, or that *Elizabeth* the plaintiff proved it, and that it does not traverse or deny *nisi argumentative*, that *Shelly* died intestate; *pro placito* she says that *Robert* the obligor never proved the will of *Shelly*, but died soon after him without proving the will; and that it is true, that the plaintiff was made executor of the will of *Robert* the obligor, and after his death proved it, and took upon her the execution thereof; and farther says, that before the proving of the will of *Robert* the obligor by her, as aforesaid, or the administration of the goods of *Shelly* to her committed, *viz.* the 31st of *July* 1689, she refused before the ordinary to prove *Shelly's* will, or to administer as executrix to him, whereby *Shelly* died intestate, and administration of his goods and chattels was committed to the plaintiff, and that *Tho. Shelly* left no goods and chattels sufficient *ad satisfaciend. ejus debita & separales denar. summas per ipsum diversis personis debet. & solubiles & adhuc insolut. existen. prater debitum predict. superius petit. ac ei debet. per & super scripta obligatoria predict.* To this replication the defendant demurred generally, and the plaintiff joined in demurrer, and judgment was given in *C. B.* for the defendant, and the plaintiff brought a writ of error upon that judgment in *B. R.* and assigned the general errors; and after the cause had been several times argued, the Court delivered their opinions *seriatim*, that the judgment ought to be affirmed: *Gould, J.* said, That the case was in short, *Shelly* the obligee makes his will, and makes *Robert Wankford* the obligor his executor, who dies without proving his will, and makes his wife the daughter of *Shelly* his executrix, who proves the will, and also takes administration to *Shelly* her father with his will annexed, and whether this be a release of the bond, was the question: He said that if *R. W.* had proved the will, then that had been clearly a release, for it was agreed, that if the obligee makes the obligor his executor, and the obligor proves the will, it is a release (*a*); but the question is, Whether the obligor's not proving the will will alter the case? and he said that he thought it did not: He put the cases of 20 *E. 4. 17. a. Br. Exec. 114. 21 E. 4. 3. 81. Plowd. 184.* That if several obligors are bound jointly and se-

Co. Lit. 264. b.
Where several
are jointly and
severally bound,
if the obligee
makes one of
the obligors his
executor, either
sole or jointly

(a) In *Carey v. Goodings*, 3 *Bro. Ch. 110.*, it is ruled as a settled point in equity, that the appointment of the

debtor executor, is no more than parting with the action; and that the debt remains a trust.

verally,

verally, and the obligee makes one of them his executor, it is a release of the debt, and the executor cannot sue the other obligor: So if the obligee makes the obligor and J. S. his executors, although the obligor never administers, yet the action is gone for ever; and although the obligor dies and makes an executor, the other co-executor of the first testator who survives, shall not have an action against the executor of the obligor; he said that this case was stronger; that it appeared here that though the executor had not proved the will, yet he had administered, and by that means had put it out of his power to refuse the executorship; and that the proving the will was only to signify to the spiritual court that there was a will, because in case there was none, then there was a dying intestate, and the commission of administration belongs to them. He said, that an executor is a complete executor to all purposes but bringing of actions (a), before probate; that before probate he may release an action, may be sued, may alien, or give away the goods, or otherwise intermeddle with them; and for this he cited *Plowd.* 280. 5 *Co.* 28. a. 1 *Mod.* 213.; and he said that this would be the diversity, that if the executor refused the executorship, then he refused to accept the appointing him executor as a release, and by consequence the making him executor will have no operation; but if he does not refuse the executorship, but administers the goods, then that will be a release; and he cited also the case of *Abram versus Cunningham*, 2 *Lev.* 182. 1 *Ven.* 303. where it was resolved, That administration committed where there was a will and an executor, though the will was concealed, was void, and that it was all one, though the executor of the will, when it did appear, refused to intermeddle. He said, that if there were several executors, and all died before notice of the will; yet this making the obligor executor would amount to a release: That there was no case express in point, viz. that it is a release where the executor never proves the will, but that it is cited, being put generally without mentioning whether the will was proved or not, and that upon such a general putting and agreeing it to be a release, it is to be concluded that there is no diversity. That where the executor does administer, which he appears to have done in this case, and by that has put it out of his power to renounce, it will be a release, like the case in 3 *Co.* 26. b. A. makes an obligation to B., and delivers to C. to the use of B., it is the deed of A. immediately, but B.

with a stranger, the debt is released, though the obligor never administers. Cro. Car. 373. Plowd. 264. Leon. 320.

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Executor is complete executor before probate for all purposes but bringing actions. 1 *Cham.* Cases 265. 2 *Jo.* 72. 2 *Mod.* 146. 3 *Keb.* 725. *Plowd.* 277. 1 *Roll.* Abr. 917, 926. *Co. Lit.* 292. b. *Rep. B. R.* Temp. Hard. 52. 1 *Ark.* 460. 2 *Atk.* 285. *Offic. Ex.* 33. 5 *Co.* 28.

Obligation delivered by A. to C., to use of B.

(a) In 2 *Bacon's Ab.* 413. 4th ed. there is a *qn.* if he may not declare generally, making a profert of the letters testamentary, though he has

not obtained probate; for if *oyer* is demanded, it can only stay the suit till probate obtained.

may

is a deed till B.
refuses. Dyer.
49. 2. Vide
Thompson v.
Leach, 2 Salk.
618.

may refuse it, and by that the bond will lose its force; so of a gift of goods and chattels, if a deed be delivered to the use of the donee, the goods and chattels are in the donee immediately before notice or agreement; but the donee may refuse, and by that the property and interest shall be divested.

Powys, J. said, That an executor is a complete executor as to every intent but bringing of actions before probate, so that he may release a debt due to the testator, assent to a legacy, intermeddle with the goods of the testator; and he cited, besides the books already cited, 36 H. 6. 7. *Dy.* 367., and argued from the form of the probate of the will; but an administrator cannot act before letters of administration granted to him: He said, the executor by acting would become liable to the suits of all the creditors of the testator before probate, which *R. W.* the executor in the present case had made himself liable to by administering the goods of the testator, and therefore according to the known maxim of the law, *qui sentit onus sentire debet & commodum*, that this would amount to a release of the debt without probate; he cited the case of *Abram* versus *Cunningham*, and the opinion of *Twylden* (which is remembered in the report of that case in 1 *Ven.* 303.), which opinion was also cited by *Gould*, J. in his argument, that though the executor debtor refuses, yet the action is gone, and the administrator cannot sue him; but he seemed not to rely upon it, but said it differed much from this case: That here *H.* should have a burden, such as an executor is put upon, whether he would or no: He said, that the diversity would be where the executor did actually refuse before the ordinary, and where he did not actually refuse, but only did not intermeddle with the administration; in the first case it would be no release, but it cannot be otherwise in the second, and more clearly so, where the executor did intermeddle with the administration, as he did in the present case.

Porvell, J. said, That the case was, the obligee makes the obligor his executor, who dies before he proves the will; and the question is, Whether the debt be extinct, or the administrator of the obligee may sue the heir? He cited the case 21 *E.* 4. 4. If the debtee makes the debtor and another his executors, although the debtor never administers, yet the action is lost for ever, and said it was agreed on all hands, that if the executor had proved the will, the action had been gone; and that the case 21 *Ed* 4. had been confirmed since by many authorities, and that none of those authorities take any notice of the probate of the will; and if there were any such diversity, it could not but have been taken notice of in some of them; but the reason that they go upon is that a personal action

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once suspended by the act of the party, is gone for ever, and though in some cases it may be suspended and revive again, yet never where that suspension is from the act of the party. He said, that some books say the action is gone, some say the debt is gone, and some say the debt remains; but they will be all reconciled by this, that the debt will be affets (a): He said he could not see how the probate of the will altered the case; for the executor has assented to the executorship by intermeddling with the goods, and the act of the ordinary has no effect; because the ordinary has no right in any case where there is an executor, and all the executor's right is under the will, and all that right that he hath, he has by the will. He is in possession of all the testator's goods before probate, and may bring trover or detinue; so he may avow for rent where a reversion for years comes to him from his testator: But though he may commence an action before probate, yet he cannot indeed go on with the action; for when he comes to declare, he must produce in court the letters testamentary (b); but now if probate were necessary to make him an executor, he could not bring the action without probate, as is evident in the case of an administrator, in which case there is no right till administration committed; for till then the administrator cannot bring an action; but in the case of an executor, the not proving the will is only an impediment to the action; but the right of action is the same before probate as after (c); and the reason why an executor cannot go on before probate is for the enforcing of probates, as is said in *Hutton* 21., because upon probates there are inventories exhibited and other acts done by the executor, which are for the benefit of the creditors of the testator. He said, that if administration of the goods, &c. of the obligee was committed to the obligor, that was but a suspension of the action, and no extinguishment of the debt; but the reason of that is, because the commission of administration is not the act of the obligee, and so is 8 Co. 136. Sir *John Needham's* case; he said, that unless the executor proved the will, he could not continue the executorship, and so is *Dy.* 372. That, in such case, administra-

Executor may commence an action before probate, but not declare. 9 E. 4. 47.

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1 Rol Abr. 917. A. 2.

Where administration is committed to debtor, the action is only suspended. 1 Sid. 79. Vide 1 Atk. 460.

(a) Vide note to pa. 300, acc.

(b) An executor cannot bring a bill of interpleader before probate, *Mitchell v. Smart*, 3 Atk. 606., nor a bill of revivor, *Comber's Case*, 1 P. Wms. 766. But subsequent probate makes the bill good. *Humphreys v. Humphreys*, 3 P. Wms. 350.

(c) Per Curiam, *Smith v. Mills*, T. R. 480., an executor has the right im-

mediately on the death of the testator, and the right draws after it a constructive possession. The probate is a mere ceremony; but, when passed, the executor does not derive his title under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue, but he may release, &c. before probate.

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tion *de bonis non* must be committed; but that case was the first case of it; and it appears, by the case in 1 *Leon.* 275. (where debt was brought against one as executor in such a case, and the defendant pleaded in abatement of the writ, that he was an executor of an executor, and therefore ought to have been so sued, and not as an immediate executor; and the plaintiff replied that the first executor died before probate, and the writ was awarded to be good,) that there was no notice taken amongst the lawyers of that opinion, and indeed the opinion seemed to have proceeded rather from a compliance with the usage of the spiritual court, than from any ground in the reason and nature of the thing; for the power the executor has of making an executor to the first testator is by the will of the first testator, and not at all from the act of the ordinary, and it is by an implied power given to the first executor by the will of his testator, and so is *Plowd.* 290. *a.* All the interest of the administrator is from the ordinary, but all an executor's interest is from the testator. He said, that this extinguishment was not wrought by way of actual release, because then the debt could not be assets; but by way of legacy or gift of the debt by the will; and where that debt, or any part of it, is expressly devised by the will to pay a legacy, it will be assets to pay such legacy, because the testator did not intend to extinguish the whole debt, and so is the case in *Yelv.* 160. but where there is no such special devise, the debt shall be extinguished notwithstanding any other legacies. In 1 *Ro.* 920, 921, it is given as the reason why the debt remains assets in the hands of the executor, and that it is extinct only by the will. A man cannot in strictness make a release by will (*a*), but the debt will be extinguished in such case with the diversity before taken: He said, that there would be a great diversity where the obligee made the obligor executor, and where the obligor made the obligee his executor (*b*); for in the last case the debt is not extinct, but only upon supposal that the executor has assets, which he may retain to pay himself; for though the obligee may give the obligor the debt, yet that will

Hob. 10. Where debtor is made executor, the debt is extinguished, not by way of release, but legacy; and it is assets.
1 Chan. Caf. 242.

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If obligee is made executor to obligor, and there is not assets, he may sue the heir.
Jon. 345.

(*a*) Where a testator gives a debt or forgives a debt, it is a testamentary act, and will not be good against creditors, but against executors it may. And though it cannot operate as a release at law, equity will carry it that length. *Sibthorp v. Moxon*, 3 *Atk.* 580.

(*b*) In *assumpsit* against an executor, the defendant pleaded, that the plaintiff was appointed co-executor

with him. The plaintiff replied, that he had never accepted the appointment, or administered. The replication on demurrer was held good; and Lord *Kenyon* said, that the proposition, that if *A.* owe *B.* a sum of money, and choose to make him his executor, though *B.* will not act, his legal remedy is extinguished, is a proposition too monstrous to admit of any argument.

not

not hold *vice versa*, but in case of failure of assets the executor may sue the heir: Indeed where the executor has assets, the debt is gone, but that is because he may retain and pay himself, and so is 12 H. 4. 21. *Plow.* 185. b. But if he has no assets, the action is never so much as suspended, for the executor may sue the heir at the very day, and so it is not within the rule of a personal action once suspended, &c. He said, that there had been an objection made from the form of the letters of administration in this case; that the Court does indeed take notice of the forms used in the spiritual court, and where there is no probate of the will (as in this case) they grant an immediate administration, and not an administration *de bonis non administratis*; which is done where the executor has actually administered the goods of the testator: but this form has not been constant, and administrations *de bonis non administratis* by the executor have been granted in the former case, and so it was done in the case of *Heyden and Wolfe*, *Palm.* 153. 2 *Cro.* 614. *Hutt.* 30. He said, that if the making the obligor executor did extinguish the debt by way of release, then it would work *volens volens*: But if it took effect as a legacy, then the obligor refusing the executorship does also lose the benefit of what he would have had by being executor, and consequently the debt will not be extinguished (a): But he said he would not determine that point, because it appeared upon the pleading, that the executor administered goods of the testator, which is an agreement to the executorship, and so strong an one that he could not afterwards refuse it; and so the want of probate would not alter the case.

Where executor dies not having proved the will, ecclesiastical court grants an immediate administration, and not *de bonis non*, &c.

Holt, C. J. The pleadings in this case are perplexed; but upon the whole matter the case is but this, *viz.* *R. W.* is bound to *S. S.*, who makes *R. W.* his executor, and dies; *R. W.* administers several goods, but dies before probate; the plaintiff takes administration to *S. S.*, and brings an action on the bond against the heir of *R. W.*; and the question is, the obligee having made the obligor executor, and he having administered some of the goods, though not proved the will, Whether that will amount to a release? and I agree it is a good release as this case stands.

There have three objections occurred, which render this point considerable.

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(a) *A.* gave legacies to persons by the description of his very good friends, and in a further part of the will desired them to act as executors.

They are not entitled without proving the will, or acting under it. *Read v. Devaynts*, 3 *Br. Ch.* 95.

ast, That

1st, That when a will is made, and *H.* executor thereof, if the executor does administer, but dies before probate of the will, an immediate administration is committed; whereas, if the will had been proved, the administration must be *de bonis non administrat* by the executor.

2dly, That the constant course of the spiritual court is, where the executor dies before probate, to make the ground and foundation of their granting administration to be, because the executor died *ante omnes executionis testamenti super se susceptum*.

3dly, That though the executor was administrator, yet if he dies before probate, his executor cannot be executor to the first testator. But, notwithstanding these objections, I hold that the obligee's making the obligor his executor is a release in that case, and that for these reasons:

Where the same hand is to receive, and ought to pay, it is an extinguishment.

1st, Because by being made executor he is the person that is entitled to receive the money due upon the bond before probate; and as he is the person that is entitled to receive it, he is also the person that is to pay it; and the same hand being to receive and pay, that amounts to an extinguishment: The rule does not indeed always hold, but is liable to these limitations:

1st, If the obligor makes the obligee, or the executor of the obligee, his executor, this alone is no extinguishment though there be the same hand to receive and pay; but if the executor has assets of the obligor, it is an extinguishment, because then it is within the rule, that the person who is to receive the money, is the person who ought to pay it; but if he has no assets, then he is not the person that ought to pay, though he is the person that is to receive it; and to that purpose is the case of 11 *H.* 4. 83., and the case of *Dorchester v. Webb*, 1 *Cro.* 372. 1 *Jo.* 345. Where the obligee makes the executor of one of the obligors his executor, who has no assets, this is no discharge of the debt; because, though this executor, as executor of the obligee, is the person to receive, yet having no assets of the obligor, he is not the person who ought to pay: But if the executor of the obligee is made executor to one of the obligors, and has assets of the obligor, the debt is extinct, and the executor cannot sue the other obligor, for the having assets amounts to payment. And the same point was again resolved, *Hill.* 24 & 25 *Car.* 2. *B. R.*, in the case of *Lock and Crosse*, where the obligee was made executor to one of the obligors, and in an action by him against the other, where the matter was pleaded, the plea was held to be naught, because he did not shew to what value the assets were that he administered; but if the defendant had shewn that he administered goods to the value of the debt in demand, it had been a good plea.

Executor of one of the obligors having no assets, made executor to obligee, it is no extinguishment. *Hob.* 10. *Hutt.* 128. 2 *Lev.* 73. 3 *Keb.* 116. *Jon.* 345. *Cro.* *Car.* 372.

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2dly, Suppose the obligor takes administration to the obligee, in that case the same person has a right to receive the money, and is to pay it, and yet that will be no extinguishment, and so is 8 Co. 136., Sir *John Needham's* case; but the reason of the diversity is, because the administration is made such by act of law, but the executor by the act of the testator, and for that reason it is no extinguishment; but if the administrator, having no assets, pays a debt of the intestate to the value of the bond, out of his own money, that will be a release; though I do not know that it has ever been adjudged so.

Administration committed to obligor. 1 Rol. Abr. 934. b. 2. 1 Sid. 79. 1 Leon. 60. &c. Vide 2 Bl. Rep. 306. 1 Atk. 460.

3dly, If the executrix of the obligee takes the obligor to husband, that is no extinguishment of the debt, and so is the case of *Grossman and Read*. Co. Lit. 264. 1 Leon. 320. *Moor*, 236. But if the obligee herself takes the obligor to husband, that is an extinguishment of the debt, because it would be a vain thing for the husband to pay the wife money in her own right; but he may pay money to her as executrix, because, if she lays the money so paid to her by itself, the administrator *de bonis non* of her testator (if she dies intestate) shall have that money as well as any other goods that were her testator's; for if the goods of the testator remain in specie, they shall go to his administrator *de bonis non*, because in that case it is notorious which were the goods of the testator, and they are distinguishable; and there is the same reason where money is kept by itself, and the husband permits it so to be; but if the husband seizes it, it will be his, and will be a *devastavit* (a). In case of a feme covert made executor, the husband has a great power: He may administer and bind her though she refuses, and may release the debts of the testator (b); so is 33 H. 6. 31. But the wife cannot do any thing to the prejudice of the husband without his consent.

Obligee taking obligor to husband is an extinguishment; otherwife of executrix of the obligee. Post. 326. Co. Lit. 264. b. 1 Leon. 320.

Feme executrix. If the husband converts goods or money, they become his, and is a *devastavit*. 4 T. R. 617.

My second reason is, That when the obligee makes the obligor his executor, though it is a discharge of the action, yet the debt is assets, and the making him executor does not amount to a legacy, but to payment and a release. If *H.* be bound to *J. S.* in a bond of 100 l., and then *J. S.* makes *H.* his executor, *H.* has actually received so much money, and is answerable for it, and if he does not administer so much, it is a *devastavit*.

Debtor made executor, the debt is assets.

3dly, By administering, the executor has accepted of and taken upon him the whole administration, and is a

What executors may do before probate.

(a) The husband commits a *devastavit* and becomes a bankrupt, the wife is not answerable. *Benyon v. Collins*, 2 Bro. Ch. 323.

(b) The husband of a feme administrator may surrender or dispose of a term which she has in that right. *Thruston v. Coppin*, 2 Bl. Rep. 801. 3 Wils. 277.

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Vid. Plowd.
280. b. 9 Co.
38. Co. Lit.
292. b. 2 Bl.
Rep. 654. Hut.
31. 3 Lev. 58.
1 Vent. 70.
Skin. 23. 1 Rol.
917. 3 P. Wms.
349. Com. Dig.
Administration,
B. 9. 1 vol. 3d
edit. pa. 340.

complete executor. He is before probate entitled to receive all debts due to the testator, and all payments made to him are good, and shall not be defeated, though he dies and never proves the will. All the testator's goods are actually in his possession, though at what distance soever, and he may maintain trover for them; and as he may maintain a possessory action, so he may avow for rent where a reversion of a term comes to him; and for such rent as has accrued after the death of the testator, he may avow before probate, because the reversion is vested in him by the will; but for such arrears as accrued due in the testator's life-time, he cannot avow without probate: He may bring an action of debt for a debt due to the testator before probate, so that though the *teste* of the original appears to be before the probate, yet it is well; so is 1 *Ro.* 917. Now the executor having all these advantages before probate, and the law taking notice of him, and he having actually administered, which is such an acceptance of the executorship that he cannot refuse it afterwards, this is a release. Indeed if he had not administered, but had refused in the ecclesiastical court to be executor, that making him executor had not been a release; for you shall no more force a man to accept of a release against his will, than of a deed of grant; and the subsequent refusal makes the deed void *ab initio*; as if a deed of release were delivered to *B.* to the use of the obligor, if the obligor refuses to accept it, it is not the deed of the obligee, and he may plead *non est factum* to it. 5 *Co.* 119. b. And besides, if the obligor were never executor, then was he never the person entitled to receive the money, and consequently not within the reason of the rule of extinguishment. It is said that *H.*, who is made executor, is executor till actual refusal, and that was the resolution of the case of *Abram* versus *Cunningham*; and if so, then his administering in this case having put it out of his power to refuse, he has by administering accepted the executorship, which is that which makes the release: If *H.* makes his debtor and *J. S.* his executors; if *J. S.* administers, though the debtor never does, this is a release; so is 20 *E.* 4. 17. 21 *E.* 4. 3. And where *H.* makes his will and several executors, if one of them refuses and the rest administer, that makes his refusal void, and the refusing executor may notwithstanding release any debt. 5 *Co.* 28. a. And in actions brought by them the refusing executor must be named. 9 *Co.* 97. And if the refusing executor survives, he may take the executorship upon him. The case indeed in *Dy.* 160. is contrary, and holds that the refusing executor must come in and act during the life of the acting executor; but the 21 *E.* 4. 23. is contrary to *Dyer*, and according to the preceding position; and in *Hardr.* 111., *Pawlett* versus *Freke*,

Where several executors are, and one only refuses, the refusal is void. Ante 3.

Freke, it is resolved, that where the refusing executor survives, administration committed during his life is void. In my Lord *Petre's* case, which was before a commission of *Delegates at Serjeants-Inn*, where the case was, that several executors were named in the will, and one refused, and the other acted, and those that acted died, and administration was committed before any refusal by the surviving executor to *J. S.*; the administration was held to be void, because the refusing executor surviving, might, notwithstanding his former refusal, have taken upon him the executorship; and afterwards, on another refusal of the surviving executor before the ordinary, administration was committed to the Lord *Petre*, and was held to be good; and upon that title he maintained in this court an action of trover for a jewel.

Post, pl. 14.
1 Vent. 277.
1 Sid 266.

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If *H.* makes the obligor and others his executors, and the obligor refuses, but the others administer, and the obligor dies first, yet the debt is released; and the only reason of that must be, that the refusal was void, and the obligor might have come in and administered notwithstanding; for the probate by the other executors is for his benefit.

Obligor made co-executor, refuses, and dies before the others who administered, the debt is extinguished. Offic. Ex. 44.

Now I come to answer the objections; and as to the first, That though an executor has administered, yet an immediate administration is committed, if he die before probate, and not an administration *de bonis non*. I answer, that the reason of this is, because the administering is an act *in pais*, of which the spiritual court cannot take notice, and they must commit administration according as it appears to them judicially, and not according to the fact, and yet the acts done by the executor are good.

Objections.

As to the second, that the administration in this case is grounded upon this, That the executor died *ante onus executionis testamenti super se susceptum*; I answer, that these words are to be understood in a limited sense, viz. That the executor died *ante onus*, &c. *super se susceptum* in the ecclesiastical court.

3dly, And which is the most considerable objection, That the executor dying in this case before probate, his executor is not executor to the first testator, but administration must be granted *cum testamento annex*, though he did administer. To this I answer, that the executor by administering has taken upon him the executorship, and has put it out of his power to refuse (*a*). 9 Co. 33. b., *Hensloe's* case: And where an executor administers, though

Where executor administers and after refuses, administration cannot be committed during his life.

(*a*) *R. Read v. Truelove*, *Ambl.* 417. That an executor who administered part of the assets should be charged with his receipts, though he renounc-

ed the executorship, and paid the money to the other executor, who proved the will.

None can prove
a will but who is
named executor
therein.

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Palm. 156.

he refuses afterwards before the ordinary, yet administration cannot be committed during his life; and if administration be granted, it is void, and so is 1 *Mod.* 213., *Parten's* case. Now though the executorship ceases by the death of the administering executor in this case; yet he being executor by his administering, that has by consequence had its operation of a release already. But then it may be said, What is the reason why, the executor dying before probate, though after administering, his executor shall not be executor to the first testator? Why? It is because his executor cannot prove the will of the first testator, and consequently is incapable of recovering his debts, and consequently of being his executor: The administering executor may prove his testator's will, because he is the person named in the will; and if he does so, his executor shall be executor to the first testator, because there needs no new probate; but where the executor dies after administering and before probate, his executors cannot prove the will of the first testator, because he is not named executor to him in the will; and no one can prove the will but who is named executor in the will; the executor of an executor may renounce being executor to the first testator; but if he does not renounce, he is executor of course. 1 *Cro.* 614. And so it was held in the case of *Abram and Cunningham*: The executor's not proving the will, does upon his death determine the executorship, but not avoid it. If an executor obligor proves the will, and afterwards dies intestate, (which is a parallel case to the present case,) his administrator is not executor of the will of the first testator. But yet the debt having been extinguished by his being completely executor and proving the will, though his administrator cannot continue the executorship, that will not revive the debt; so here, the administering executor not proving the will, and so his executor not being executor to the first testator, (if he were justly executor by administering to extinguish the debt,) this inability of continuing the executorship will not alter the case.

The judgment of *C. B.* was affirmed.

13. *Tilny versus Norris.*

[Pasch. 12 Will. 3. B. R. 1 *Ld. Raym.* 353. S. C.]

Where executor
or administrator
is charged as assignee, the judgment is de bonis propriis. Post. pl. 25. 1 *Roll.* Abr. 929. B.

THE plaintiff brought covenant against an administrator, and declared upon a lease for years to the intestate, wherein was a covenant for him, his executors and assigns, to repair, and shews *quod status de E' in premissis devenit* to the defendant, and that he entered, and after that the premises fell into decay, and he had not repaired.

The

The question was, Whether an administrator was liable *in jure proprio*, as an assignee? And Mr. *Williams* argued, that this covenant runs with the land, and binds the assignee; and for that reason an executor may be charged as a tertenant; as in case an executor enters and does waste. 1 *And.* 52. And he prayed judgment *de bonis propriis*, and insisted, that where he answers as assignee, the judgment against him is *de bonis propriis*; but where as executor, though the breach be in his time, it is *de bonis testatoris*. Judgment *nisi* for the plaintiff, no counsel attending on the other side.

Cro. Jac. 647,
648, 671, 3.
1 Saund. 112.
Carth. 519. S. C.
Vide 1 Will. 4.
3 Will. 29.
Doug. 176.

14. *Rock versus Leighton, Vic. Salop.*

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[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 589. S. C. Comyns 87. S. C.]

AN action was brought for a false return of a *feri facias* against an administrator *de bonis intestati*, and *non cul.* pleaded; a verdict was for the plaintiff, and a case was made for the opinion of the Court, *viz.* The plaintiff, being an administrator, was sued by *A.*, and, pending that suit, let judgment be obtained against him by *B.*, and did not plead this judgment in bar of the said action, but sold the goods of the intestate to pay *B.* *A.* recovered and sued a *fi. fa.*, on which the sheriff levied part, and as to the rest returned a *devastavit*. And it was said for the plaintiff, in maintenance of the action, that the suffering judgment by default was no confession of assets, and also that the sheriff ought not to have returned a *devastavit* on the *fi. fa.*, but a *nulla bona*, and upon that there ought to have been a *seire fa.* inquiry. *Et per Cur.*,

3 D. 400. p. 3.
S. C. Judgment against executor by confession or default, is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned; and so is a jury. Lutw. 670. Poel. 314.

1st, The sheriff may return a *devastavit* on the first *fi. fa.* if he will: It is at his peril if false, and the inquiry is only for his safety.

Devastavit may be returned on *fi. fa.* without inquiry. 1 R. A. 929. pl. 3. con. 6 Mod. 308.

2dly, If an executor confesses or suffers judgment by default, he admits assets in his hands, and is estopped to say the contrary.

3dly, That he might have pleaded the first judgment obtained by *B.* against the action of *A.* & *riens ultra*, but having not done it, he has confessed he has assets to answer the judgment in this as well as the first action; and if a *sci. fa. inq.* had been awarded on the said judgment, and a *devastavit* returned, and *non devastavit* pleaded, the administrator could not have given in evidence the first judgment, because he had not pleaded it when he might; so there was no occasion for an inquiry, nor is he injured by this return of a *devastavit* on the *fi. fa.*, since it could not have been avoided if there had been an inquiry.

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Estoppel.

athly, The administrator's not pleading the first judgment and *nihil ultra*, when he might, is an admission of assets as to the second judgment, so that he has slipped his time, and is estopped; so the jury are estopped as well as the plaintiff, and their verdict is void, and that the sheriff shall take advantage of all estoppels between the parties; as if an action be brought against a feme sole, and she marries, and judgment is against her, and then execution, and the sheriff take her by that name, she shall be estopped

2 Cro. 727, 482.

1 Roll. Rep. 450.

to say the contrary. Judgment *pro def.* Vide *Dyer* 57. 2 *Sid.* 70. (a)

(a) It appears from *Ld. Ch. Jus. Hall's* note of this case, which is inserted in the report of *Ewing v. Peters*, 3 *T. R.* 685., to have been his opinion, "That if an heir plead *non est factum*, or conditions performed, a general judgment shall be given, if the matter pleaded be found against him. So in the case of an executor, if the matter pleaded be found against him, he admits assets." The same note was referred to in *Ramsden v. Jackson*, 1 *Atk.* 292., by *Ld. Hardwicke*, who decided accordingly, that an executor having pleaded *non est factum*, which was found against him, could not afterwards be relieved, on account of a deficiency of assets.

In *Skelton v. Hawling*, 1 *Wilf.* 258., *A.* brought debt against *B.*, an administrator, who suffered judgment by default, and made her will, appointing *C.* executor. An action on the judgment, suggesting a *devastavit*, being brought against *C.*, he pleaded *plene administravit* the effects of *B.*, and the judgment by default was ruled to be evidence of a *devastavit*. Vide *W'carton v. Richardson*, *Sir.* 1075.

In *Ewing v. Peters*, 3 *T. R.* 685. the defendant (an executor) having pleaded *non est factum*, and payment, to an action upon a bond, and omitted to plead *plene administravit*, and verdict and judgment being given against him, the sheriff, on a *fi. fa.* returned *nulla bona* and a *devastavit*, which was ruled to be sufficient evidence in an action on the judgment, suggesting a *devastavit*.

In *Eyre v. Hinton*, *Str.* 732. it was also ruled, that if an executor does not plead a judgment against his testator to the action, he shall not afterwards plead it to the *scire facias*. It is an universal principle of law, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded upon it, or in a *scire facias*. Per *Buller, J.* in *Ewing v. Peters*, *Gilb. C. P.* 258. *Cooke v. Jones*, *Cowp.* 727.

It was formerly held, that if an executor pleaded *plene administravit*, and the plaintiff could prove assets unadministered to any small amount, he must have a verdict for his whole demand. But *Lord Mansfield*, in *Harrison v. Beccles*, cited 3 *T. R.* 688. ruled that the executor was only liable to the amount of the assets in his hands. Vide *Dearne v. Crimp*, 2 *Bl. Rep.* 1275. *Waters v. Ogden*, *Doug.* 452. *Barry v. Rush*, 1 *T. R.* 691. *Pearson v. Henry*, 5 *T. R.* 6.

In *Higherdale v. Cowper*, in the Court of Arches, 10th May 1793, an incumbent instituted a suit against the executor of his predecessor for dilapidations; the defendant gave a general negative issue, contesting the whole of the claim; and, after witnesses were examined, the defendant was discharged upon his bringing in his inventory and account, and paying the assets (which were considerably less than the sum claimed), with costs. *Editor's MS.*

15. *House and Downs v. The Lord Petre.*

[19 Dec. 1700. At the Court of Delegates in Serjeants-Inn Hall.]

ROBERT Lord *Petre* died in the year 1638, and made *William Petre* Esq. his brother, his executor. *William Petre* died, and left *Lucy* his wife, and one *Henry Todd*, his executors. *Lucy* only proved the will; she died, and left *House and Downs* her executors. Afterwards *Henry Todd* renounced the executorship of the will of *William Petre*, and administration was granted to the Lord *Petre*, now defendant, of the goods and chattels of *Robert Lord Petre*. *House and Downs*, being executors of *Lucy*, insisted that this administration belonged to them; and it was agreed by the whole Court, as well civilians as common lawyers, that *Henry Todd* being a joint executor with *Lucy*, and surviving her, the sole right of executorship to *William Petre* did accrue to him by survivorship, though he never concurred in proving the will, nor acted as executor, and this right was not divested out of him till he receded from it by an actual renunciation; by which both *William Petre*, and *Robert Lord Petre*, as from that time died intestate, so as to entitle the ordinary to grant administration of the remaining personal estate, but not so as by relation to render effectual the will of *Lucy*, and transmit those executorships to the plaintiffs: But in another matter the common lawyers and the civilians disagreed; and the common lawyers held, that where there are several executors, and one renounces before the ordinary, and the rest prove the will, by the common law he who renounced may at any time afterwards come in and administer, and, though he never act during the life of his companions, may come in and take on him the execution of the will after their death, and shall be preferred before any executor of his companions. *Vide* 21 E. 4. 23. *Office of Executors* 6. *Hard.* 111. *contra*, 9 Co. *Hensloe's case*, Dy. 160. But the civilians held, that by the civil law a renunciation is peremptory (a).

Where there are two executors, and one proves the will and dies, the executorship survives to the other; but if he then renounces, the testator is dead intestate. S. C. 3 D. 411. p. 3. 412. p. 4.

That after one hath proved it, the other cannot renounce till after his death.

Ante 308. 9 Co. 37. *Ante* 3. 1 And. 27. 3 P. Wms. 249. 3 Bur. 1463. 1 Bl. 456.

Swinburn, part 6, l. 3. 22.

(a) *Vide* 1 Bl. Rep. 456.

16. *Parker versus Atfeild.*

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 678. S. C.]

IN *debt* upon a bond against an administrator, he pleaded several judgments, & *riens ultra* 5 s., which was found The plaintiff, as to one judgment, replied, there was but

Executor in pleading judgments with penalties should

shew how much is really due.

S. C. 3 D. 385.

p. 20. 394. p. 17.

Cases B. R. 527.

W. Jon. 91.

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Pleading of judgments is a confession of assets to satisfy them, and the *riens ultra* a certain sum is not material.

Vide Rep. B.R. Temp. Hard. 225. 1 Mod. 30. 2 Lev. 40. 1 Brownl. 49. Str. 1028. Sho. 280. Skin. 299. 3 T. R. 688.

so much due, which the debtee was willing and ready to accept in full, and that the defendant by fraud deferred the payment of that money, and the judgment was kept in force to defraud the creditors; and replied the same matter as to another judgment, and demurred as to the rest. The defendant rejoined, that as to one judgment, it was not kept on foot by fraud, &c.; and as to the other, no assets *ultra* so much, which was liable to the judgment, and so to the third, and as to the rest joined in demurrer. *Et per Cur.* 1st, The best way for an administrator to plead, is to plead truly and honestly, and though there is a judgment for a penalty, he ought to plead the judgment, and shew how much is due (a). 2dly, If he pleads several judgments, and any one judgment be ill pleaded or found fraudulent, the plaintiff shall have judgment. 3dly, If an administrator plead twenty judgments, it is a confession of assets to satisfy twenty judgments, and the *riens ultra* 5 s. is but form, not material nor traversable. 4thly, If a judgment being pleaded, and *per fraudem* replied, issue is taken thereupon, and by evidence it appears the debtee was willing to take less than is recovered, it is evidence of fraud; but if it be shewn that the administrator had not assets to pay that sum, it is no fraud. 5thly, If an administrator pleads two or more judgments, and the plaintiff confesses the plea to be true, and prays judgment of assets *in futuro*; if afterwards assets came to his hands, he may satisfy the judgments pleaded; for the judgment of assets *de futuro* is only to be paid off after the other judgments are satisfied, and therefore there is no inconvenience in making the pleading of fraudulent judgments a confession of assets. 6thly, The conclusion of the replication with *hoc paratus est verificare* to every judgment, is well; but a general conclusion to the whole had been better. *Vide 2 Saund. 49, 338.*

(a) To a plea of judgments, and no assets *ultra*, plaintiff replied *per fraudem*; and it appeared that the judgments were given for nearly double the debts due, by mistake, and with no fraudulent design, the amount of the debts really due being more than the assets. The judge before whom the cause was tried held, that the acknowledging judgments for more than was due, was conclusive evidence of

fraud, and precluded farther inquiry, and the jury found *thereupon* a verdict for the plaintiff—which was set aside, the Court holding that as there was no fraud in fact, there was none in law. The Court then added, that the defendants ought to have pleaded the sums really due, and gave leave to amend the pleadings and the former judgments, *Pease v. Naylor*, 5 T. R. 81, *Vide Cox v. Joseph*, 5 T. R. 307.

17. *Rouse versus Etherington.*

[Pasch. 1 Ann. B. R. 2 Ld. Raym. 870. S. C.]

IN an action in C. B. against two executors, a *capias* issued against both, which as to one was returned *non est inventus*, but the other appeared, and judgment was given against both; whereupon he that appeared brought a writ of error, and concluded *ad dampnum ipsius*. *Et per Holt, C. J.* By the statute 9 E. 3. if debt be brought against several executors, and one appear, and the other make default upon the grand distress, the Court may proceed against him that appears; and if the plaintiff recover, judgment shall be against all the executors for the goods of the testator; and the 25 E. 3. c. 17., which gives a *capias* in debt, has been always construed within the equity of the 9 E. 3. So that if there be several executors defendants, and a *cepi* is returned as to one, and a *non est inventus* as to the rest, the plaintiff shall proceed against him that appears, and shall have judgment against all; for the default upon the *capias* is the same as upon the grand distress.

If one executor appears upon the *capias*, and another makes default, judgment shall be against both *de bonis testatoris*, and if error be brought both must join. S. C. Holt 313, 1 Keb. 452, 743, 822.

* Thus the judgment being against all, one only ought not to bring the writ of error; for the judgment is *ad grave dampnum* of them all, and the costs, which are only adjudged against him that appeared, are but an accessory to the principal judgment, which cannot be reversed *quoad* them only.

Ld. Raym. 71. 1403. Carth. 7. Str. 233, 606. 1 Will. 58. Bar. 1792.

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18. *Brookes versus Stroud.*

[Pasch. 1 Ann. B. R. *Vide* this Case, Title *Abatement*, pl. 6. pag. 3.]

19. Anonymous.

[Trin. 1 Ann. B. R. 7 Mod. 31. S. C. by the name of *George v. Pierce.*]

PER *Holt, C. J.* If *H.* gets goods of an intestate into his hands after administration is actually granted, it does not make him executor of his own wrong; but if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action brought, and then

H. is a tort executor by taking the intestate's goods before administration, not after. Ante 297. 1 Show. 242. Dy. 166. b. Swinb. 289.

1 Roll. Abr. 918. then he may plead *plene administravit* (a). *Vide 5 Co. C. Far. 31.*
 3 Saik. 16. Cro. 33. b. *F. N. B.* 44. But if he takes upon him to act as executor, he is chargeable to all events.
 El. 565.

(a) *R. acc. Padget v. Priest*, 2 T. R. 2 H. Bl. 18. *Vide Vaughan v. Brown*, 97. *Curtis v. Palmer*, 3 T. R. 587. 2 Str. 1106.
 affirmed in the Exchequer-chamber,

20. Shardelow *versus* Naylor.

[Hill. 1 Ann. B. R.]

Will made by a wife in pursuance of a power reserved before marriage, is not properly a will, nor proveable by the ordinary.
Far. 147.
Goldb. 109.
1 And. 181.
1 Jon. 388.
4 Co. 61. 8 Co. 82. a. 1 Vent. 186. Bridgm. 33. Holt 102. S. C. 1 Mod. 311. 2 Mod. 372.

A Woman by deed settled her estate in trust, reserving a power to herself to give by her last will and testament, as she should think fit, so much of her estate in legacies; and this was done before marriage, with the consent and privity of the intended husband, who refused nevertheless to be a witness or a party to the deed: The marriage took effect; the wife made a will and died, and the executor proved the will. *Et per Holt, C. J.* This is not a will, neither ought the ordinary to prove it; if he does, a prohibition lies. Where a woman is an executor and marries, there she may make a will with consent of her husband, and cannot without. 1 *Jon.* 157. So if a woman having debts due to her marries, she may make a will *quoad* these, and the ordinary may prove it. In other cases she cannot, for it is only a writing in form of a will. However, in the principal case it appearing, that the ordinary had only granted administration *quoad* the goods in this will, it was allowed as reasonable. *Cro. Car. 219 (b).*

(b) It is settled by various cases, that a disposition made by a feme covert under a power or permission, and intended to be of a testamentary nature, must be governed by the same rules, and attended with the same requisites, and have the same operation, as a common will. If it is to operate as a devise of land, it must be attested according to the statute of frauds, *Longford v. Eyre*, 1 P. Wms. 740. *Wagstaffe v. Wagstaffe*, 2 P. Wms. 258. If it is a disposition of personal property, it must be proved in the Spiritual Court, *Rejs v. Erwer*, 3 Atk. 156. *Jenkin v. Whitehouse*, 1 Bur. 431. *Stone v. Forsyth*, Doug. 707.; and such probate is sufficient proof, *Balch v. Wilson*, Prec. Ch. 84. But the regular course is for the Spiritual Court not to grant probate of the will, but administration,

with the will, as a testamentary paper, annexed—note to *Stone v. Forsyth*. *Vt. Rex v. Beitesworth*, 2 Str. 1111. It is revocable and alterable in its nature, *Hauber and Curtis*, 2 Eq. Ab. 671. pl. 3. It is revoked by the same circumstances as a common will, *Cotter v. Layer*, 2 P. Wms. 623. *Vide Lawrence v. Wallis*, 2 Bro. Ch. 319. It is ambulatory until the death of the maker, and lapses by the previous death of the appointee, *Obe v. Heath*, 1 Vez. 135. *Duke of Marlborough v. Ld. Godolphin*, 2 Vez. 61. *Southby v. Stonehouse*, 2 Vez. 612. The words are to have the same construction as if it was a proper will; and the disposition can only take effect from the consummation of the writing by the death of the testatrix, *Southby v. Stonehouse*, ubi sup.

21. *Eaves versus Mocato.*

[Pach. 2 Ann. B. R. 2 Ld. Raym. 865. S. C. named Elwes
versus Mocato.]

EXECUTOR brought *assumpsit* for money of his testator had and received by the defendant, to the use of the plaintiff as executor, and was nonsuit: And now the Court was moved for a direction to the master to tax costs. *Et per Curiam*, He shall not pay costs, for he could not sue but as executor; and it is not material whether the money was received by the defendant since the death of the testator, or before; for suppose it since, it is not assets in the hands of the executor, till it is recovered (a). But in trover and conversion by an executor, upon a trover and conversion in the time of the executor, the executor if nonsuit shall pay costs; for he need not name himself executor, and the goods are assets in the executor's hands, though he never recover them, 1 Ven. 199. So if an executor will not go on to trial according to his notice, he shall pay costs for that (b).

Assumpsit by executor for testator's money received to the plaintiff's use; executor shall not pay costs of nonsuit. Hob. 80. Cro. Car. 219. Ante 207. 1 Jon. 241. S. C. Far. 48. But upon another point, Mo. Cases 93.

(a) *Vide* this case more accurately stated by Holt, C. J. in *Jenkins v. Plume*, ante 207. *Vide* also the several authorities referred to in the notes to that case. The point here stated is held not to be law in *Goodbwaite v. Petrie*, 5 T. R. 234. So in *Marsh v. Kennedy*, And. 359. the authority of this case, as here reported, was expressly overruled.

(b) An executor or administrator shall pay costs if he be guilty of any laches or delay in the progress of a cause, *Hullock* 189. R. that they are liable to costs on judgment of *nonsuit*, *Hawes v. Saunders*, 3 Bur. 1584. *Lamley v. Nichols*, Cas. Pr. C. B. 14. In *Nunex v. Modigliani*, H. Bl. 217. costs were paid by an administrator for withdrawing his record before trial; but that point was not the question in dispute, *vide Hullock*'s Observations on the Case, pa. 192. As leave to discontinue is in the discretion of the Court, it is given with or without costs, according to the circumstances of the case, and will depend upon

whether there is laches or delay, or it is a fair transaction. Where an executor in an action upon a bond against an heir, discovered just before the trial was to come on that the estate which he relied upon as assets was conveyed by the ancestor, he was allowed to discontinue without costs, undertaking not to bring a fresh action without leave of the Court, *Bennet v. Coker*, 4 Bur. 1927. *Vide* also *Baynham v. Matthews*, 2 Str. 871.; but where one executor brought the action alone, there being others, he had only leave to discontinue upon payment of costs, *Harris v. Jones*, 3 Bur. 1451. 1 Bl. 451. In *Ogle v. Moffat*, *Barnes* 133. an executor was excused from costs for not going on to trial, his witnesses being prevented by accident from attending, and he being guilty of no wilful default. On a nonsuit executors do not pay costs, *Bigland v. Robinson*, 3 Salk. 105.; nor on judgment, as in case of a nonsuit, *per Cur.* in *Bennet v. Coker*.

22. Berwick *versus* Andrews.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 971. S. C. 2 Ld. Raym. 1502. S. C. cited.]

Mod. Cases 125.
Executor may
bring debt, sug-
gesting a devas-
tavit in his tes-
tator's life-time,
upon a judgment
obtained by his
testator against
the executor of
J. S. 1 Lev. 231,
255. 1 Mod.
188. 1 Sid. 397.
6 Mod. 125,
126.

JUDGMENT was obtained against J. S. as executor, and now the executor of him that obtained the judgment brought an action of debt upon that judgment against the said J. S., suggesting a *devastavit* in the life-time of his testator, and had judgment by *nihil dicit* in C. B. And now error being brought it was objected, that the plaintiff was not privy to the judgment, and therefore ought first to have brought his *scire facias*, and then have suggested a *devastavit* according to the case of *Wheatly and Land*, 1 Saund. 216., and that this was carrying *devastavits* a step farther than they had yet gone. *Scd per Cur.* It lies for the executor of him to whom the wrong was done, though it lies not against the executor of him that did the wrong. Here the defendant is the person against whom the recovery was, and he has admitted assets; and the executor may as well maintain this action, as he may an action of debt for an escape where his testator might. So an executor of a parson shall maintain debt for tithes, as the testator might: for in this case the tort was to the property of the testator, and vested an interest in him, and is within the equity of the statute *de bonis afportatis*; and the same reason holds for an action of debt, as for a *scire facias*. *Vide* 2 Sid. 102.

Str. 212. Fort.
359, 367.
Com. Admini-
stration, B. 13.
1 vol. 3d ed. pa.
344. Morg. 563.

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31. Smith *versus* Harmon.

[Pas. 3 Ann. B. R.]

To a sci. fa.
upon an interlo-
cutory judgment
against an exe-
cutor, the de-
fendant cannot
plead a judgment
in bar. Mod.
Cases 142.
1 Kib. 55, 310,
477. 3 Keb.
160. 2 Keb.
548. Far. 64,
65. Ray. 16,
55. 1 Sid. 131.
Ante 8, 42.
6 Mod. 142.
Skin. 565.

THE plaintiff as administrator to J. S. sued a *scire facias* against the defendant, setting forth that his intestate sued the defendant as executor in such an action, & *taliter processum fuit* that judgment was given against the defendant by *nihil dicit*, and a writ of inquiry of damages awarded, which abated by the death of the intestate before the return of the writ; and that administration was granted to the plaintiff; and commanded the sheriff to summon the defendant to shew cause, why the plaintiff should not have judgment? The defendant pleaded, that the plaintiff ought not to recover, because his testator was indebted to A. in 100l. by bond, on which A. sued him and recovered judgment, and that he had no assets *ultra*, &c. To this the plaintiff demurred, and had judgment; for

for that the statute never intended that the executor should stand in any other circumstances to make another defence than the party to the contract himself might have made against the inquiry, and he could have pleaded nothing but a release, or other matter in bar arising *puis darrain continuance*. He is by the words of the statute to shew cause, why damages in such case shall not be assessed and recovered; and if he shall appear at the return and not shew any matter sufficient to arrest the final judgment, then a writ of inquiry shall be awarded, &c. And arresting judgment is by matter apparent in the record, and not extrinsic; and heretofore they pleaded in arrest of judgment, as now we move. 5 *Hd.* 7. 23. 2 *Ro.* 716. 12 *Hd.* 4. 24. *Co. Ent. Error* 95. *Yedu.* 152. 2 *Cro.* 220. And the executor cannot be hurt by this, for the judgment is only *de bonis testatoris*, as if recovered against the testator himself.

Hob. 97, 98.

2 *Lev.* 277.
Raym. 210.

24. Archbishop of Canterbury *versus* Wills.

[Hill. 6 Ann. B. R.]

IN *debt* upon a bond entered into by an administrator to the ordinary upon taking letters of administration, the question was, Whether an administrator by virtue of this obligation was bound to go and give in his account in the spiritual court, without being cited? *Et per Holt*, Chief Justice, who delivered the opinion of the Court, it was said; 1st, That it appears by the statute of Edward the Third, that an executor was compellable to account before the ordinary, and so was an administrator: But then the ordinary was to take the account as given in, and could not oblige them to prove the *items* of it, nor swear to the truth of them. *Vide Noy* 78. 2 *Inst.* 6. So it was of a creditor sued in the ecclesiastical court, for he had a proper remedy at common law: But if a legatee had sued for an account in the ecclesiastical court, the defendant before the statute was compellable to prove the whole account, for the legatee had no other remedy, and the ecclesiastical court which had a jurisdiction of legacies could not otherwise do right: Yet in such a case, if the executor would pay him, he could not sue farther, for he had right done him, the executor was not liable, but of necessity that right might be done. *Raym.* 407, 470, 471.

Ante 172, 253.
Since the stat.
22 Car. 2. Ad-
ministrator is
bound to account
without citation.
Lutw. 882.

8/3/10 151 n
undt after decr
3 ath. 248. -

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3 Chan. Rep. 72.

2dly, A person entitled to distribution on the 22 *Car.* 2. is in consequence entitled to sue for an account as a legatee was; for the next of kin is a legatee by the statute, and as a statute legatee shall have the same remedy as the other legatee might before the statute. The condition of

H. entitled to
distribution by
22 Car. 2. may
sue administrator
to prove his ac-
count. Ante
251.

But creditor cannot sue the administration-bond for non-payment of a debt, for it does not extend to that.

of an administration-bond was to account when required: so it appears by *Co. Ent.* 128. *Ergo* he was to account before he was legally cited, which could not be *ex officio*, and therefore the statute *Jac.* 2. whereby the ordinary is prohibited from citing him in *ex officio*, had really no effect at all, for the law was so before: But since the statute of *Car.* 2. the condition of administration-bonds being, that he account at a day certain, he must account accordingly at peril, and that without citation or suit; and this account must be in court; and if he comes at the day, and no court is held, he shall be excused, for he may plead he was ready, and no court, &c. But then this account is not examinable, unless a party interested comes in and controverts it: and whereas by the words of the condition he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be needless and infinite (a).

(a) *Vide* 3 *Atk.* 248, 252. *Cowp.* 140. *Ambler* 183.

25. Buckley versus Pirk.

[*Trin.* 9 *Ann.* B. R. Rot. 28.]

Ante, pl. 73. Where a defendant is charged as executor, judgment shall be de bonis testatoris, though he might have been charged as assignee. *Cro. El.* 711, 712. 2 *Roll* 603.

[317] 3 *D.* 379. p. 27. *S. C.* Cases L. E. 12. *Ante* 79.

Moor. 366. *Br. Det.* 238. *Palm.* 117. 2 *Brownl.* 206. If lessee for years assign, there is no privity of estate between him and assignee, but of contract. 5 *Co.* 31. *Styl.* 79, 80.

COVENANT by the plaintiff against the defendant as executrix of *Jonathan Pirk*, wherein she declared *quod cum per indentur* made between the said *Prudence Buckley*, executrix of *Thomas Buckley*, and the defendant's testator *Jonathan Pirk*, reciting, That one *Sarah Shampersnoon* did demise the premises to the said *Thomas Buckley* for twenty-one years, *reddend. 24l. per annum*; that *Thomas* made *Prudence* his executrix, and died; *testatum existit*, that *Prudence* assigned to *Jonathan Pirk pro toto residuo dicti termini*, who covenanted to repair; that *Jonathan* entered and was possessed, and died: and that *Mary* as his executrix entered and was possessed, and suffered the premises to be out of repair, &c. The defendant pleaded a judgment obtained against her, and no assets *ultra*, and the plaintiff demurred: And Serjeant *Pengelly* argued that the plea was good, for that the defendant was only charged as executrix, and not as assignee, and therefore was liable only to answer *de bonis testatoris*; and that there was no privity of estate between the plaintiff and the defendant, (where the lessee or his executor hath the term, and the lessor the reversion,) but only a privity of contract. If a man

man assigns his term, or makes a feoffment, reserving rent, this is only a charge by the contract; and though such contracts may be real, yet they cannot create a privacy of estate; therefore he concluded the plaintiff could not charge the defendant as assignee.

Parker, C. J. 1st, A covenant to repair is a covenant that must run with the land, for it effects the estate of the term, and the reversion in the hands of any person that has it. If the covenant to repair be on the part of the lessor, the rent is the greater; if the lessee be to repair, he pays the less rent; and as an assignee has the benefit, it is but reasonable an assignee should be subject to the charge. 2dly, He held, that if the executor of a lessee enters, the lessor may charge him as an assignee for the rent incurred after his entry, in the *debet* and *detinet*; and if the rent be of less value than the lands, as the law *prima facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to any thing else: and therefore in such case the defendant cannot plead *plene administravit*, for that confesses a misapplication, since no other payment out of the profits can be justified till the rent be answered. On the other hand, if the rent be more worth than the land, the defendant may disclose that by special pleading, and pray judgment, whether he shall be charged otherwise than in the *detinet* only: *Quod Powell concessit*. 3dly, It was held, that the defendant was charged as executrix in this case, and that so plainly, that there was indeed no better way to charge her as such. That the plaintiff had her election of charging the defendant as executrix or assignee; that having charged her as executrix, she can only have judgment against her as such. *Sed adjournatur*.

Covenant to repair runs with the land, and why. 2 Jon. 169, &c. Hob. 282. Executor chargeable in the *debet* & *detinet* for rent incurred after his entry; but if the rent be more worth than the land, he may plead it. 1 Vent. 271. Ante, pl. 6. 1 Sid. 266. Pollex. 125. 2 Vent. 209. 1 Mod. 186, 186. Yelv. 103. 3 Keb. 189, 446. Poph. 121. 2 Danv. 504. pl. 9. Roll. Abr. 921. pl. & Dier 314. Cro. Jac. 671. Hob. 123. 1 Saund. 112. Allen 42. Doug 183. 1 Will. 4-

26. Churchill contra Hopson.

[318]

[Mich. 12 Ann. in Canc. 1 Wms. 241. S. C.]

SIR Charles Hopson made Churchill and Goodwin his executors, men of good credit: Goodwin being a banker received all the money, but Churchill joined with him in the receipts, taking his note to shew that he received not the money: *Et per Harcourt*, Lord Chancellor, If two trustees join in a receipt, and one receives the money, he only that receives shall be liable. If there be two executors, and they join in a receipt, and one only receives the money, as to creditors who are to have the utmost benefit of law, each is liable for the whole; though one executor alone might give a discharge, and the joining

Two executors join in an acquittance, but one only receives the money; both are chargeable for it to creditors, but the actual receiver only to legatees.

Ambler 218.

ing of the other was unnecessary; but as to legatees, and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not change the other; for the joining in the receipt is only matter of form; the substantial part is the actual receiving, and this only is regarded in conscience (a).

(a) It appears from the report of this case in *P. Wms.* that *Goodwyn* was banker to the testator, and *Churchill* paid him a sum of money belonging to the estate; and that several debtors on paying their debts, required *Churchill* to join in the receipts; and that *Goodwyn* becoming a bankrupt, *Churchill* brought his bill to be indemnified from the executorship, and against *Goodwyn*'s bankruptcy. The decree, which is stated from the register's book, by Mr. Cox, in a note to that report, orders, "that if the plaintiff joined with *Goodwyn* in giving receipts for any sums of money paid to *Goodwyn*, or if he paid any sums, which he received from the estate, over to *Goodwyn* before his bankruptcy, he should be discharged thereof. The distinction between executors and trustees is not taken of by the Court according to that report, but was urged at the bar. The same distinction as to the mere act of signing a receipt has been recognized in *Leigh v. Barry*, 3 Atk. 583, *ex parte Belchier. Amb.* 218. *Aplyn v. Brewer*, *Prec. Ch.* 173. *Marrell v. Cox and Pitt*, *Vern.* 570. 1 *Eq. Ab.* 247. It is also adverted to in *Sadler v. Hobbs*, 2 Bro. Ch. 114. But in all those cases the decision was upon a different point, except *Aplyn v. Brewer*, which is so superficially reported, that it does not appear what the actual decision was. The principle, to which the distinction is referred, is, that one executor alone may give the discharge, and the joining of the other is an unnecessary act.

But *Ld. Northington*, in *Westly v. Clarke*, note to Cox's *P. Wms.* 82., and *Finch's Prec. Ch.* 173. expressed his disapprobation of the distinction. In that case there being three executors who were not to be answerable for the acts of each other, and one of them having called in a mortgage

and received the money, the others afterwards executed the assignment and signed the receipt indorsed. The executor receiving having failed, *Ld. Northington* held upon a bill by the legatees, that the other executors were not answerable for the money, and that the signing the receipt was only evidence as far as it goes of the actual receiving the money. In *Scurfield v. Hawes*, 3 Bro. Ch. 90. the Master of the Rolls said, "it was contended, that it was the rule that executors joining in a receipt are both liable; to that I enter my dissent; for I do not hold that an executor cannot in any case be discharged from a receipt given for conformity.

In the following cases one executor has been held responsible for the loss of money in the hands of the other. *Marrell v. Cox and Pitt*, *ubi sup.* where they jointly sold stock, and joined in the transfer, but whether any acquittance was given did not appear, and each received a moiety of the money; on the failure of one, the other was held answerable for the whole. *Sadler v. Hobbs*, *ubi sup.* where A. and B. executors joined in drawing a draught for the testator's money, payable to a partnership of A. and C. In *Scurfield v. Hawes*, *ubi sup.* a testatrix directed her executors A. and B. to pay the interest of a mortgage to a person for life, and afterwards gave the principal to another, and directed, that if the mortgage should be paid off, the money should be laid out in government securities to the same use. A. being dead, the bill stated, that A. and B. received the money and laid it out, but B., who had failed, by his answer said, that he received the whole, and A. no part of it; but it was in evidence that A. joined in the reconveyance and a receipt for the money; and no part of it was laid out

on other securities. *A.*'s executors were held liable. In all these cases the executor did more than merely join in a receipt. *Ld. Thurlow*, in *Sadler v. Hobbs*, said, he took it to be clear, that where, by any act or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor, they shall both be answerable. *Vide Crisp v. Stranger*, *Nels. Rep.* 109. By a note of *Westley v. Clarke*, mentioned in *Mr. Cox's* note to this case, it appears *Lord Northington* said, he should have thought the co-executors liable, if they had been present at the time when the money was paid. With respect to trustees, *vide Foster v. Townley*, *Cro. Car.* 312. *Bridg.* 35. *Fellows v. Mitchell and Owen*, 1 *P. Wms.* 81. *Attorney General v. Randall*. 21 *Vin. Ab.* 534. pl. 9. 2 *Eq. Ca. Ab.* 742. *Ex parte Singleton*, *Cox's* note to *Fellows v. Mitchell*.

Concerning the other distinction, *viz.* between creditors and legatees, *Mr. Cox* observes it is not made by the decree, nor has it been adopted in later cases; and *Ld. Thurlow*, in *Sad-*

ler v. Hobbs, says, "That a creditor shall have a right to charge an executor, and a legatee not," seems an odd distinction. But the ground of *Ld. Harcourt's* distinction seems to be, that, when a creditor has a right to satisfaction at law, a court of equity will not interpose to prevent his obtaining it; but that a legatee can only recover by the assistance of a court of equity, which will not be given against a person who was in no default, and has only joined in a formal receipt. The Master of the Rolls, in *Scurfield v. Howes*, says, "Perhaps, in a court of law, the signing the receipt would be conclusive evidence of receiving the money: I think it is not so in a court of equity." Probably *Lord Harcourt* entertained the same idea concerning the conclusive evidence of a receipt in a court of law. But in *Stratton v. Rastali*, 2 *T. R.* 366., it was ruled, that notwithstanding a person has joined in signing a receipt, he is not at law precluded from shewing that the money did not come to his hands.

Execution.

I. Oviat *versus* Vyner.

[*Paſ. i W. & M. B. R.*]

IF on a *fieri facias* all the money is not levied, the writ must be returned before a second execution can be taken out, for that must be grounded upon the first writ; and recite that all the money was not levied upon the first; but if upon the first all the money had been levied, the writ need not have been returned, for no farther process was necessary.



Where it is necessary to return a *fieri fa.* and where not. *Mod. Cases* 203, &c. *Hob.* 58. *March* 47. *Syd.* 91. *Far.* 52. 5 *Co.* 90. *Cro. El.* 209. 4 *Leon.* 194.

2. Wolf *versus* Davison (a).

[Pas. 8 W. 3. B. R.]

Defendant taken on a *capias* utl. after the year, is in execution at the party's suit without prayer. 5 Mod. 195, 200. 1 D. 122. p. S. C. Comb. 373.

IN *debt* for escape of H. in custody by a *capias utlagatum* after judgment, and *nil debet* pleaded, the jury found a special verdict, viz. that the plaintiff had outlawed one J. S. after judgment upon a *capias ad satisfaciend.* sued out within the year; and that two years after the outlawry he was taken up upon a *capias utlagatum*, and the sheriff suffered him to escape: Upon argument it was admitted, That if a *capias utlagatum* had been sued out within the year, no prayer had been necessary, because the plaintiff might have had a *ca. sa.* without a *scire facias*; but this being after the year, the question was, Whether he could be said to be in execution for the plaintiff in the original action without prayer? And the Court held, That he was, though no prayer was entered, because he would have been so if he had been taken within the year; and here is no difference, for the plaintiff was at the end of his process at the exigent, and no continuance nor *scire facias* lies after *capias utlagatum*, and the very *capias utlagatum* which is sued at his charge imports an election of the body. *Vide* 3 Cro. 918, 850. 1 Ro. 810. 1 Sid. 280. 5 E. 3. c. 12. 5 Co. 89. 5 Mod. 200, &c.

N. B. No judgment was ever given, for the defendant died: but Holt, on hearing it, said, they were inclined to give judgment for the plaintiff.

(a) *Vide Barnes*, 321, 325.3. Pennoir *versus* Brace.

[Trin. 9 Will. 3. B. R. 1 Ld. Raym. 244. S. C.]

Carth. 404. 5 Mod. 338. Judgment in trespass against four, who bring error, and afterwards one dies. The plaintiff cannot sue execution without suggesting the death upon record, but need not sue *sci. fa.* Show. 405. 1 D. 372. p. 6. S. C. Cases

TRESPASS against four defendants, and judgment against them in C. B. Whereupon they brought error in B. R. for error in fact: After the record certified, one of the plaintiffs in error died, where the plaintiff in the original action took out execution by *ca. sa.* against all four. *Et per Cur.* it was admitted, 1st, That the writ of error was abated. 2dly, That if the execution taken out had been against three only, omitting the fourth, it had been erroneous, because not warranted by the judgment. 3dly, That if the execution had not been so long delayed by the writ of error, so that it might have been *teste* as of the same term with the judgment, then the death of the one plaintiff had not been material, because subsequent

Execution.

‡ 319

subsequent to the *teste*. 4thly, The Court ruled this execution erroneous, and therefore superseded it; because the death of the party did not appear to them by any matter of record, and till they were so apprised of it, they were bound up by the writ of error. 5thly, Supposing that were suggested upon record, it was then doubted whether the plaintiff could have execution in this case without a *scire facias*; wherein this difference was taken, *viz.* Where any new person is either to * be better (a) or worse by the execution, there must be a *scire facias*, because he is a stranger, to make him party to the judgment, as in case of executor and administrator; otherwise where the execution is neither to charge or benefit any new party, as in this case where there is a survivorship; for there is no reason why death should make the condition of the survivors better than before. *Vide* 21 H. 7. 16. Mo. 367. Noy 150. Carter 112, 193. (not resolved.) Holt C. J. held, That a *capias* or *fi. fa.* being in the personalty, might survive, and might be sued against the survivors without a *scire facias*; otherwise of an *elegit*, for there the heir is to be contributory.

B. R. 130.
Comb. 441.
Holt 640.

Where upon the death of any party *sci. fac.* is necessary.

* [320]

a Inst. 471.
Dyer 174. Mod.
Cases 138. 4
Mod. 404.

(a) R. acc. 2d. Ld. Ray. 768. 1 Wilf. 302. Doug. 637. (615.) *Vide* Str. 233.

4. Smallcomb *versus* Buckingham.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 251. S. C. Comyns 35. S. C.]

A. And *B.* had each a several judgment against *C.* *A.* sues out a *fi. fa.*, and delivers it to the sheriff about nine in the morning to be executed. Afterwards, about ten o'clock, *B.* sues out a *fi. fa.*, and brings it to the sheriff forthwith, and desires it may be executed; accordingly the sheriff executes the last *fi. fa.*, and after that executes the first *fi. fa.*, and takes the same goods again that were taken upon *B.*'s execution, and upon this the first vendee brought trover against the second vendee, and the sheriff: And it was held *per Cur.* That, as the goods were bound from the day of the *teste* of the writ at common law, so now by 29 Car. 2. c. 3. they are bound from the day of the delivery: But at common law, if two writs had been of the same *teste*, the sheriff was bound to execute that first, that was first delivered. By the same reason, if two writs of *feri facias* come to the sheriff in one day, he ought to execute that writ first which came to hand first, for he has no election: And in this case

Two *fi. fa.* delivered the same day to the sheriff, who executes the last first; the execution is good, but he is liable to the plaintiff in the first. 3 Cro. 174. 1 Sid. 271. Mo. 402. Cro. El. 390. Cro. Car. 459. 487. Mod. Cases 292. 3 D. 319. p. 9. 11. S. C. 5 Mod. 576. Comb. 428. Carth. 419. 3 Salk. 159. Holt 302. Cases B. R. 146.

D d 2

there

Execution.

there is a *prius* and a *posterius* in the same day (*a*). In consequence the sheriff makes himself liable for executing the writ first that came last, and must answer it to the party that brought the first writ, who may bring an action against him; but the execution shall stand good: Judgment for the plaintiff. Otherwise it would have been, had he delivered his writ, but bade the sheriff stay execution till another day.

N. B. The case was here, that he who brought the first *fi. fa.* told the sheriff he was not in haste, so took out no warrant, nor left any (*b*) fee; and this inclined the opinion of the Court more strongly against him (*c*).

(*a*) *R. acc.* 1 *T. R.* 731. In *Roe ex dem. Wrangbam*, 3 *Wils.* 274. the demise of the lessor of the plaintiff was laid on the day of his ancestor's death, which was objected to on account of the rule of there being no fraction of a day; but the Court overruled the objection, for *fiction legis neminem lædere debet*; but aid much it may; and by fiction of law the whole term, the whole time of the assizes, and the whole session of parliament, may be and sometimes are considered as one day, yet the matter of fact shall overturn the fiction in order to do justice between the parties. So in *Coombe v. Pitt*, 3 *Bur.* 1423., 1 *Bl.* 437. the defendant in a *qui tam* action pleaded

another action brought the same term, without alleging a priority, and relied upon the fiction of the term being only one day; but the plea was disallowed; and Lord Mansfield said, "though the law does not in general allow the fraction of a day, yet it admits it in cases where it is necessary to distinguish; and I do not see why the very hour may not be so too, where it is necessary and can be done." Vide also *Johnson v. Smith*, 2 *Bur.* 950. 1 *Bl.* 215.

(*b*) 1*st*, Vide 1 *Wils.* 44.

(*c*) Vide *Hutchinson v. Johnson*, 1 *T. R.* 729. *Rybot v. Peckham*, 1 *T. R.* 731. *n. Bradley v. Wyndham*, 1 *Wils.* 44.

5. *Mosely versus Warburton.*

[Mich. 9 Will. 3. B. R. 1 *Ld. Raym.* 265. S. C.]

Bishop's power to compel a sequestration.

[321]

ON a *feri facias* against Warburton, a fellow of Winchester College, the sheriff returned *clericus beneficiatus nullum habens laicum feodum*. Hereupon a *feri facias de bonis ecclesiasticis* issued to the bishop, who sent his mandate to the warden and fellows of the college to sequester his salary, and they refused. The bishop now moved to know, whether he might not compel them by ecclesiastical censures. The Court asked, Whether this were an ecclesiastical constitution? The universities they said were not, for they have no cure; but are only societies *ad studendum & orandum*; but a prebend is an ecclesiastical benefice. And in such case, if a prebend have a sole distinct corps, it may be sequestered; but where he is only a member of the body aggregate, and the inheritance is in the dean and chapter, there cannot be a sequestration. *Per Cur.* Let the bishop do as he ought by law.

6. Coot *versus* Lynch.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 427. S. C.]

JUDGMENT was given in *Ireland*, and on a writ of error affirmed in *B. R.* here, and costs taxed, and a *capias* sued out of the King's Bench here, directed to the sheriff of the same county in *Ireland*, to take the defendant for these costs: but upon motion the execution was set aside, because there can be no such writ. The method is to have a writ, reciting all the proceedings here in *England*, directed to the judges of the King's Bench in *Ireland*, requiring them to issue process of execution: and by this mandatory writ, the cause is restored to that court (a).

Carth. 460.
5 Mod. 421.
Judgment of
B. R. in *Ireland*
affirmed here.
Costs must be
levied by writ
out of B. R. in
Ireland. 2 Bulst.
118. Yelv. 117.
2 Cro. 534. 4
Inst. 73. 3 Cro.
371. 3 D. 298.
p. 3. S. C. Cases
B. R. 225. Holt.
372. Lilly Entr.
225, 271.

(a) *Vide* 6 G. 1. c. 5. 22 G. 3. c. 53.7. Kingsdale *versus* Mann.

[Trin. 2 Ann. B. R.]

THE sheriff delivered possession by virtue of an *habere facias possessionem* in the morning: some hours after the sheriff was gone, and the party in possession, the defendant came and turned him out again. *Et per Cur.* If the plaintiff had been turned out immediately after he was put into possession, or while the sheriff and his officers were there, an attachment might have been granted; for this had been a disturbance to the execution, and a contempt; but, being several hours after, *Curia dubitavit*. 2dly, It was agreed, that the Court might grant a new *habere facias possessionem*, if the first was not returned.

What is disturbance of execution of *hab. fac. poss.*
6 Mod. 27.
S. C. 115, 298.
Holt. 154. Str.
830.

8. Perkins *versus* Woolaston.

[Pas. 3 Ann. B. R. 2 Ld. Raym. 1256. S. C.]

A Writ of error is a *superfedeas* from the time of the allowance, and that is notice of itself; but if the defendant have notice before allowance, it is from the time of that notice a *superfedeas*: But if a writ of execution be executed * before a writ of error allowed, or notice, it may be returned afterwards. The utmost length of time the law allows for executing a writ, is the day whereon the writ is returnable; and it is not executable

* [322]

6 Mod. 130.
139. S. C. Writ of error is a *superfedeas* to execution (not begun to be executed) as soon as allowed without notice. 1 Vent. 30. Cro. Jac.

534. 1 Vent. any longer that day than the Court sits. So long as it is
 30. Yelv. 157. executable, but not executed, the allowance of a writ of
 Comb. 199, &c. error is a *superfedeas*, but not afterwards (a).
 Hob. 72. Far.
 140. 3 Salk. 133. 1 Sid. 44. 2 Lev. 5. 1 Willson 16. 2 Strange 631, 867, 1186. 4 Bur. 1340.
 Rep. 1183.

(a) If an action is brought upon the judgment pending error, and judgment obtained in the second action, it will not be set aside, but the Court will stay proceedings upon it. *Taswell v. Stone*, 4 Bur. 2454.; and if execution is sued out thereon, it will be set aside. *Benwell v. Black*, 3 T. R. 643. There is a distinction between the cases where an action is brought in the King's Bench on a judgment of the Common Pleas, and where brought upon a judgment of the King's Bench. In the first case the Court will not stay proceedings, pending a writ of error, without the defendants giving judgment in the second action; but in the other case these terms make no part of the rule, because, in general, actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment. *Bates v. Lockwood*, 1 T. R. 637. *Vide Gribble v. Abbot*, Cowp. 72. Allowance of a writ of error is a *superfedeas* to the writ of execution, and to all the subsequent proceedings founded thereupon. The writ of execution and proceedings against the bail may be set aside in one rule. *Dudley v. Stokes*, 2 Bl. 1183. When error appears to be brought merely for delay, the Court will not stay execution, as if it is brought on a judgment of nonsuit, the defendant may levy execution for costs. *Kemp v. Macaulay*, 4 T. R. 436. *Rex v. Bennett*, H. Bl. 432.

The Court refused to stay proceedings in an action on the judgment, where a writ of error appeared to be brought for delay. *Entwistle v. Shep-*

berd, 2 T. R. 78. But execution was stayed, notwithstanding the plaintiff offered to the defendant's attorney to waive the judgment if he would point out any error, which was refused. *Christie v. Richardson*, 3 T. R. 78. How it is to be made out that error is brought for delay, is matter of evidence in each case. *Kemp v. Macaulay*, *ub. sup.* Where the defendant's attorney undertook that the debt should be paid, if the plaintiff's attorney would give time, which the latter agreed to do provided no delay was intended by the other side; the defendant afterwards brought error, and a rule for staying execution was set a aside. *Cates v. West*, 2 T. R. 183.

If bail is not regularly put in, the writ of error is not a *superfedeas* of execution. *Lane v. Bacchus*, 2 T. R. 44. *Huddy v. Gifford*, Comyns 321. *Pitt v. Coucy*, 1 Str. 476. Where the writ of error is taken out before final judgment signed, bail must be put in within four days after signing judgment. *Jacques v. Nixon*, 1 T. R. 279.

Execution after error allowed, and bail, is irregular, though the writ of error was returnable before judgment signed, if it was signed the same term. *Barnes* 197, 198, 260. *Vide Str.* 631.

The allowance of a writ of error is itself a *superfedeas*, the service of the allowance is only material to bring the party into contempt, if he proceeds to sue out execution afterwards. *Jacques v. Nixon*, *ub. sup.* *Capron v. Archer*, 1 Bur. 340.

9. Booth versus Booth.

[Mich. 3 Ann. B. R.]

Where execu-
 tion is stayed by in-
 junction till af-
 ter the year,

BY injunction out of Chancery the defendant stayed the plaintiff's execution a year and upwards; the injunction being dissolved, the plaintiff took out execution without

without a *scire facias*, and this was referred to the Court for irregularity. The plaintiff insisted, that he was stopped by the act of the defendant, and that if the defendant had suspended it by writ of error so long, he had been at liberty to take execution without a *scire facias*. *Sed per Curiam*, We cannot take notice of the Chancery injunction, and you might have taken out a writ of execution, and continued it by *vice comes non misit breve*. A *superfedeas quia improvide* was awarded to the execution (a).

plaintiff must
sue a *sci. fac.*
Show. 402.
3 Mod. 187.
6 Mod. 14, 130.
212, 292, 296.
288. S. C.

(a) In *Michell v. Cue*. 2 Bur. 660., a defendant having obtained a rule to shew cause why an execution should not be set aside, being sued out after a year from the judgment, without a *sci. fa.*, but the delay had arisen on the part of the defendant, by bills in Chancery for injunctions, and obtaining time for payment, &c.; the Court held, that the rule for reviving a judgment by *sci. fa.* after the year was to prevent a surprise upon the defendant, and ought not to be taken advantage of when the delay was occasioned by himself; and discharged the rule with costs.

10. Clerk *versus* Withers.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1072. S. C.]

ADMINISTRATOR recovered judgment and sued out a *feri facias*, and delivered it to the sheriff the first of August; the sheriff seized the defendant's goods, and afterwards, viz. the 9th of September, the administrator died; the sheriff returned, that he had seized goods to the value, *sed quod remanent in manibus pro defectu emptorum*: And afterwards, viz. the 29th of September, the said sheriff was removed, and a new sheriff sworn in. And now the defendant sued a *scire facias* against the old sheriff, to have his goods again; and judgment being against him in C. B., error was brought here, and objected for the plaintiff in error, that the execution was abated, and no body could perfect it; not the executor of the administrator, because he came in *in auter droit*; and the administrator *de bonis non* could not, for he was paramount; and that this was not within the 17 Car. 2. c. 13., for that only regarded the cases after verdict. But *per Cur.* This *scire facias* is not maintainable; and these points were resolved:

6 Mod 29c,
291, 292. Rep.
A. Q. 34. S. C.
Holt 303, 646.

* [323]
1 Jo. 248, 386.
1 Co. 96. 1
Cro. 2. 8, 227.
Cro. Bl. 457.
Cro. Jac. 194.
Yelv. 33.

1st, That the plaintiff's death did not abate the execution; and that the sheriff, notwithstanding that, might proceed in it, because the sheriff has nothing more to do with the plaintiff, for the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder: * Besides, an execution is an entire thing, and cannot be superseded after it is begun.

Fieri facias
abates not by
the plaintiff's
death. Yelv. 33.
1 Sid. 29. 1
Cro. 227, 451,
&c. Cr. Jac.
73. Noy 73.
1 Bulf. 79. 2
Roll. Abr. 291. Dyer. 99. pl. 57. 1 Vent. 42. 1 Jo. 386.

Sheriff that began execution shall end it, though office expires. Mod. Cases 297.

2dly, That the old sheriff has not only authority, but is bound and compellable to proceed in this execution; for the same person that begins an execution shall end it, and a *distingas nuper vicecomitem* lies. Of these there be two sorts; one is to distrain the old sheriff to sell and bring in the money; the other to sell and deliver the money to the new sheriff to bring into court: Which plainly shews his authority continues by virtue of the first writ. *Vide Rast.* 164. *Thef. Brev.* 90. 34 *H.* 6. 36.

Seizure d'vel's descendant's proper y. 2 Saund. 400. Mv. 402. Ante 110. And he is discharged. Cro. Car. 487. 1 Sid. 438. 2 Saund. 345. 3 Keb. 397. 5 Mod. 377. 1 Lev. 282. 1 Mod. 12, 40.

3dly, That when the sheriff had seized, he was compellable to return his writ, and made himself liable at all events (acts of God excepted) to answer the value of the goods according to his return. 3 Cro. 390. 1 Cro. 459. and by the seizure the property was divested out of the defendant, and in abeyance.

4thly, They held, that the defendant was discharged; because the plaintiff having made his election, and the defendant's goods being taken, no farther remedy could be had against the defendant, but against the sheriff only. He may be compelled to return his writ: If it be a false return, an action lies; if he returns a seizure and sale, he has the money; if he has seized and not sold, that does not discharge but excuse the sheriff, and therefore the plaintiff may have a *venditioni exponas* to the sheriff, if he continues in office; if out of office, a *distingas nuper vicecomitem*, and then he must sell.

Stat. 17 Car. 2. c. 8. 5 Mod. 334. Mod. Cases 296, 298.

5thly, That since, by the 17 Car. 2. c. 13., an administrator *de bonis non* may commence an execution on a judgment obtained by an executor or administrator, it is but reasonable, and within the equity of that act, that an administrator *de bonis non* should be permitted to perfect an execution thus begun; for the right now comes to him. Judgment affirmed.

I. Rex versus Bear.

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 414. S. C.]

Difference between tenor and effectus. Post. 417, 646. S. C.

INDICTMENT for making, writing, composing, and collecting divers libels, in *uno quorum continetur inter alia juxta tenorem & ad effectum sequent'*: Upon not guilty, a ver-

Exposition of Words.

3

a verdict was for the king; and upon a motion in arrest of judgment it was held, that this was a sufficient setting forth the words of the libel; but, had it been only *continetur ad effectum sequent'*, that would not have done; for that would not import a sameness in words, but in sense and construction only.

But *juxta tenorem* imports the same words, for *tenor* is a transcript or true copy, which it cannot be if it differs from the libel. *Co. Ent.* 116. *Reg.* 169. a. *Saltaſh's Case*, *Hill.* 33 & 34 *Car.* 2. *B. R.* *Rot.* 115.

2. Wyat *versus* Aland.

[*Trin.* 2 *Ann. B. R.* 2 *Ld. Raym.* 977. *S. C.* but not *S. P.*]

AN action *qui tam* was brought by an informer against one Aland for taking more than statute-interest; and he declared, that the defendant Aland had lent to and he Nicholas 200*l.* for so long, and that at the day of payment it was corruptly agreed between them the said Aland and Nicholas, that the said Nicholas should give the said Aland 40*l.* *pro deferendo & dando ulteriorem diem solutionis, viz. tiel jour prædicto* Aland; whereas Aland was not the person to pay, for it was he that lent the money; and it was objected, that this was nonsensical and impossible, and that the statute of *jeofails* would not aid a penal information: The counsel of the other side urged, that the nonsense should be rejected, and then the declaration would be sufficient; and cited 1 *Mod.* 42. 2 *Saund.* 96. 2 *Cro.* 349. *Hall and Bonithon.* *Holt*, C. J. Where a matter set forth is grammatically right, but absurd in the sense and unintelligible, we cannot reject some words to make sense of the rest, but must take them as they are; for there is nothing so absurd or nonsensical, but what by rejecting and omitting may be made sense; but where a matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected; as in ejectment where the declaration is of a demise the second of *January*, and that the defendant *posſea, ſcil.* the first of *January* ejected him: Here the *ſcilicet* may be rejected, as being expressly contrary to the *posſea* and the precedent matter. 2dly, He seemed to hold, that an information upon a penal statute by a common informer was not within the statutes of *jeofails*, otherwise of an information by a party grieved. 3dly, He held, that the word *dando* was applicable to Nicholas, and *solutionis* to Aland; so that it bore this meaning, *viz. for giving a farther day to Nicholas of payment to Aland*, since he was to receive, and the money

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6 *Mod.* 33
S. C. He
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Vide 3 *Le*
375. *Str.*
1 *Will.* 25

was

Vide Rep. B. R.
Temp. Hard. 21.
Com. Dig.
Pleaser, C. 28.
3d ed. vol. 5. pa.
341. C. 77.
p. 371.

was to be paid to him; and where a matter is capable of different meanings, that shall be taken which will support the declaration or agreement, and not the other, which would defeat it. *Powell*, J. differed as to the first point, and was of opinion, that words unnecessary might in construction be omitted or rejected, though they are not repugnant or contradictory, but *in ceteris omnibus* agreed with the chief justice. *Adjournatur*.

Extinguishment.

Gage or Gray *versus* Acton.

[Hill. 11 Will. 3. B. R. Intr. Hill. 9 Will. 3. Rot. 293. or 243. Comyns 67. S. C. 1 Ld. Raym. 515. S. C.]

Bond to pay money after marriage between obligor and obligee, the debt is only suspended by the intermarriage. Carth. 511. S. C. Cafes B. R. 288. S. C. Holt 309. 1st vol. Lillie's Ent. 214. Freem. 512. 2 Vern. 480. 281. 2 Wms. 243. Butl. Co. L. 264. b. n. 2. 351. n. 1.

DEBT against the administratrix of her husband for 60*l.* for rent incurred in the life of the intestate, on a demise by deed to the intestate; the defendant pleaded, That the intestate *dum ipsa præfat' defendens sola fuit concessit se teneri* by bond to her in 2000*l.* with this condition indorsed, *viz.* That in case the obligor and the intermarried, and the wife survived, and the obligor left her 1000*l.*, then to be void; and farther pleads, That they intermarried; she survived; that he did not leave her 1000*l.*, that she took letters of administration; that 250*l.* came to her hands, which *she retains in part of satisfaction; and that she hath not assets *ultra*. The plaintiff demurred.

Et per Cur':

Milbourn v. Ewart and others, 5 T. Reports, 581 to 587.

* [326]

Administrator may retain a bond-debt against rent, but cannot plead a bond to another. 3 Lev. 267. Vide 3 Bur. 1380. 2 Vent. 184. 1 Ver. 450. Com. 145.

1st, An administrator may retain a bond-debt due to himself, notwithstanding that rent is due from the intestate; for whether the demise be by parol or by deed, the rents are of equal nature, and neither is superior to a debt by specialty. On the other hand a debt by specialty is equal but not superior to them, therefore an executor may plead payment of one against another, or a recovery of one against another; but in debt for rent he cannot plead there is a bond-debt due, nor *vice versa*, which is all that can be collected from 2 Vent. 184. the case objected.

And

And *Holt*, C. J. held, That the bond-debt was extinguished by the intermarriage, because it was a present debt, and the condition made no alteration; for the condition is not precedent, nor does the debt arise on the event of that: If it were, then in debt upon a bond, the plaintiff must always shew the condition broken; whereas if the defendant craves *oyer* and demurs, the plaintiff must have judgment; for the condition is subsequent, and the obligor may, if he will, pay the money due on the bond without regard to the condition.

If this be a present duty, then he held the intermarriage extinguished it *ex consequenti*, for the husband and wife are one person; the husband was the person entitled to receive the money, and that in his own right; therefore he could not at the same time be the person bound to pay; and no intention of the parties can alter the law.

The Chief Justice admitted, That if a feme executrix of an obligee marries the obligor, that will work no extinguishment, because the husband is to receive it in *auter droit*; it would be a *devastavit* by construction of law, which being a wrong, cannot be; so if a man hath a term in right of his wife, or as executor, and purchases the reversion, this is no extinguishment; because he hath the term in one right, and the reversion in another. In that case the difference of the rights hinders an extinguishment, because a third person is concerned and may be prejudiced, which cannot be by act in law.

Also he admitted, if one promises a feme sole, in consideration that she will marry him, he will leave her so much in case she survive, or covenants in the same manner, that is good; because though the covenantor and covenantee be present, yet they raise no present duty, but only a future debt upon contingency, which cannot happen during the coverture; and this is precedent to the duty, and must be specially declared upon.

Also he said, That where the wife hath any right or duty, which by possibility may happen to accrue during the coverture, the husband may by release discharge it; but where the wife * hath a right or duty, which by no possibility can accrue to her during coverture, the husband cannot release it.

But *Gould* and *Turton*, Justices, were against the Chief Justice, because it would subvert the marriage-agreement; and they held the debt was only suspended, the rather because it was not payable during the coverture, but was a debt on contingency; so that if the feme *dum sola* had released all demands, the debt had not been extinguished.

2 *Cro.* 170. 1 *Sid.* 58. 5 *Co.* 70. b. *Moor* 855. *Litt.* 236. *Hob.* 156. *Dyer* 6, 7. *Moor.* 236. *Hob.* 156. *R.* 32. *Heil.* 12. *Noy* 26. *Hutt.* 17. *Hob.* 216. 2 *Roll.* 407. 2 *Cro.*

3 T. Rep. 394.
2 Vent. 481.

Skin. 409, 420.

Feme executrix
of obligee mar-
ries obligor, no
extinguishment.
Ante 306.

Noy 26.

* [327]
Husband may
release duty
which by possibi-
lity may accrue
to the wife dur-
ing the cover-
ture; otherwise
not.

Dyer 6, 7. *Moor.*
236. *Hob.* 156.
2 *Roll.* 407.

Lit. R. 87. 2 Cro. 571. 26 H. 8. 7. b. 1 Cro. 373. 8 Co. 136.
 1 Vent. 344. 1 Inst. 264. b. 343. b. 11 H. 7. 4. b. Dyer 140.
 Hutt. 171. 1 Roll's 935. Yelv. 156. Palm. 99. 2 Cro.
 222 (a).

(a) The defendant filed a bill in equity against the heir at law, and the mortgagee of freehold and copyhold estates, mortgaged by the intestate, to redeem and be let in to have satisfaction of the bond. The Lord Keeper said, if the bond were executed, (which being doubtful was ordered to be tried,) the Court would support it as a bond; and that the freehold and copyhold being mortgaged together, the plaintiff should redeem both. *Allen v. Allen, Prec. Ch.* 137. 2 Vern. 280. *Eq. Ab.* 63. *Vide Cannel v. Buckle*, 2 P. Wms. 242. In *Milbourn v. Ewart*, 5 T. R. 381., the plaintiff brought an action against her husband's executors, upon a bond

given before marriage, with condition for payment of 3000*l.* at the expiration of twelve months after the decease of the obligor. The intermarriage being pleaded in bar, the plaintiff replied, that the bond was given in contemplation of the marriage, with intent that if the marriage should take effect, and the plaintiff should survive her husband, she should have the full benefit and effect thereof. The plaintiff had judgment on demurrer, and the Court held, that the bond was not extinguished by the intermarriage, and approved of the decision in this case, according to the opinions of *Gould and Turtos*.

Fairs, Markets, and Tolls.

Burdett's Case.

[Trin. 8 Ann. B. R.]

Q. Whether the clerk of the market can distrain ex officio, for using unlawful measures?
Mod. Cases 164.

IN trespass the defendant justified as clerk of the market within the district of *Whitechapel*, for a distress of 3*s.* 4*d.* for not using measures marked according to the standard of the Exchequer. Upon demurrer, Sir *Peter King pro def.* urged, this was an authority given by 14 E. 3. c. 12. *sect.* 2. And *Holt*, C. J. held,

That the clerk of the market could not have power to extort fines and amerciaments, otherwise than as a franchife; and it is more reasonable the clerk should bring the standard with him, than that the people should follow him, or attend at a place out of the market,

False Latin.

1. Bennet *versus* Preston.

[Mich. 4 W. & M. B. R.]

IN an appeal of murder, the declaration was, that at *Clapham in Com. Surr. venerunt prædicti Johannes & quidem Daniel Stokely modo defuncti*. And upon demurrer the Court held, That this, *viz. quidem*, being admitted to be false *Latin*, would not abate the bill or declaration, for it did not at common law; and relied upon *Long's case*. 5 Co. 121. 10 Co. 133. 1 Leon. 73. 4 Mod. 159. S. C. False Latin abates not an appeal quidem for quidam. Vide 1 Lill. 597. 4 Co. 39. b. 11 Co. 32. a. Cro. El. 108. pl. 3.

2. Redwood *versus* Coward.

[Hill. 8 Will. 3. B. R. Intr. Trin. 8 Will. 3. Rot. 645. 1 Ld. Raym. 147. S. C.]

A Verdict was entered *affident damna* for *affidunt*, and on a writ of error this was assigned for error, and insisted was future. *Sed non allocatur*; for it may be the present tense of the word *affideo*; however, in verdicts the same exactness of expression is not required as in pleading, for they are the words of a lay jury, and though it may not be proper *latin*, yet it is so common, that it is now made good by prescription. *Vide Plo. 347. 3 Cro. 647. 4 Co. 7.* And the Court said, it was not like *concessum* instead of *consideratum est* in a judgment, for that those words were of different import, and the law requires that judicial acts should appear to be done upon consideration. Affident damna well in a verdict. 2 Lill. 643. 2 Saund. 97. 1 Mod. 292. Cro. Car. 219. Cro. El. 150. 9 Rep. 51. b. 1 Sid. 27. 5 Mod. 323. S. C. Cases B. R. 109. Holt 272.

3. Dillon *versus* Harper.

[Tria. 2 Ann. B. R. 2 Ld. Raym. 898. S. C.]

IN an action against an attorney, he pleaded, That he was an attorney of the Court of Common Pleas, *et quod nullus hujusmodi attornatus non debet implacitari, &c. Et per Cur.* Two negatives may be construed as a negative in Two negatives in pleading cannot be taken as a negative. Pollex. 3. S. C. 2 Salk.

545. But upon
another point.
Holt 589. S. C.

in grants, but not in pleas, for they are to be in *Latin*, and must be construed as *Latin* ought to be, and in that respect this plea is rather a disclaimer than a claim of privilege. *Sed vide Pollex. 652.*

Knight's Case.

[Hill. 2 And. B. R. 2 Ld. Raym. 1014. S. C.]

Upon inter
action pendant
pleaded, discon-
tinuance, after
nul tiel record
replied, will not
avoid it; other-
wise of reversal
by error. Holt
255. S. C.
3 Salk. 238.

CASE against *Besaluel Knight* by a wrong name: The defendant pleaded in abatement; upon this the plaintiff, without proceeding farther, brought a new action against him by his right name, to which he pleaded another action pending. *Et per Holt*, Chief Justice: The plaintiff should first have discontinued the first action; it will be too late to do it now, for the discontinuance will relate only to the time of its being entered on record; so that upon *nul tiel record* it will be against him; for it was pending at the time of the plea pleaded: And this differs from a reversal of an outlawry or judgment by writ of error: for if *nul tiel record* be pleaded, and after that, but before the day given to bring in the record, the judgment is reversed on a writ of error, that reversal avoids the record *ab initio*, and it is a *defect de recordo*.

1. Stockhold *versus* Collington.

[Mich. 3 W. & M. B. R.]

2 Show. 342.
S. C. Quantum
meruit lies for
serving as a com-

THE plaintiff brought an action upon a *quantum meruit* against the defendant, for that he at his request had served him as a commissioner in a certain commission out of

of the exchequer, directed to him and others, for examination of witnesses: after verdict on *non assumpsit*, Tremaine moved in arrest of judgment, that the plaintiff acted by command of Court, and could not therefore take a promise of reward for the service, no more than a sheriff or bailiff. *Sed non allocatur*; for he is appointed at the nomination of the party, who ought to pay him if he employs him.

missioner on a commission to examine witnesses. 2 Saik. 557, 597. Comb. 186. Carth. 208. Holt 7. Cases B. R. 9. Vide Sho. 78. Str. 747. Espinasse Dig. 7, 8.

2. Goslin *versus* Ellison.

[Hill. 5 W. & M. B. R.]

PROHIBITION was prayed and granted to stay a suit in the Archdeacon of *Litchfield's* court against churchwardens, for a fee for swearing them and taking their presentments; and Sir *James Montague* came afterwards to discharge the rule, but was over-ruled: Mr. *Acherley* on the other side insisted, that no fees could be due but by custom or for work done, in which case a *quantum meruit* lay.

Prohibition granted to a suit for fees for swearing churchwardens. 1 Mod. 167. Skin. 589. Doug. 629, [607.] Bunb. 170. 2 Str. 1108. Com. Rep. 18. Com.

Dig. Prohibition, F. 5. vol. 6. 3 ed. 114.

3. Hescott's *Case*.

[Mich. 6 W. & M. B. R.]

AN under-sheriff refused to execute a *capias ad satisfaciendum* till he had his fees. And, upon motion against him, the Court said, That the plaintiff may bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion. *Noy* 75. *post*, pl. 5.

Under-sheriff cannot refuse to execute process till he has his fees. Vid. 2 Ljlt. 510. Post, pl. 5. 2 T. R. 155.

4. Brockwell *versus* Lock.

[331]

[Pasch. 7 W. 3. B. R.]

DEBT was brought by the bailiff of the liberty-court of the bishop of *Rocheſter*, on the 28 *Eliz.* c. 4. for 6*l.* 10*s.* fees, for an execution sued out of that court on a judgment there, and a verdict was for plaintiff; and in arrest of judgment it was objected, 1st, That debt would not lie upon this statute for fees; *sed non allocatur*. 2dly, That the act was misrecited to be of 28 *Eliz.*, whereas it was made the 29th; *sed non allocatur*; for the printed book is false, and by the parliament-roll it appears

5 Mod. 97, 47. S. C. executions out of inferior courts not within the statute 29 *El.* c. 4. 2 Mod. 241. Poph. 173. Palm. 399. Cont. Hutt. 53.

r Lill. 598.
Jones 307.
Latch 16. 18.
r Cro. 286.
Noy 27, 75.
Cro. Car. 287.

pears to be the 28th. But then it was considered, whether the statute extended to executions out of corporation-courts, &c. ? And it was held by the Court, that the statute extends to all judgments in *Westminster*, and that, whether the sheriff executes them in a county or a franchise, he shall have his fees within this statute, viz. 1 s. *per* pound for the first hundred, and 6 d. *per* pound for every other hundred : And so it is of the bailiff of a liberty when he executes any execution on a judgment given in the courts at *Westminster*, within his liberty ; but if the bailiff or other officer executes process on a judgment given in a court of a corporation or liberty, he is not entitled to fees within this statute.

5. Anonymous.

[Hill. 7 Will. 3. B. R.]

Ante, pl. 3. E. 4. **M**R. *Cartkew* moved, That an under-sheriff might attend for refusing to execute a *feri facias* till his shilling-pence was paid : The Court would not grant the rule, but said it was extortion, for which he might be indicted.

6. Peacock *versus* Harris.

[Pasch. 8 Will. 3. C. B.]

To what execution the statute 29 El. c. 4. extends, and to what not. Post, pl. 12. 2 Sid. 255. 1 Vent. 351. Ante 209. 1 Lill. 597. 5 Mod. 97. Skin. 363. Vide stat. 3. G. 15. 8 G. 25.

IT was resolved, 1st, That the statute 29 *Eliz. cap. 4.* does not extend to real executions, but only to executions in personal actions ; therefore it does not extend to an *habere facias seisinam* or *possessionem*. 2dly, That upon a *capias ad satisfac.* the sheriff shall have his fees for the whole debt. 3dly, *Powell* junior, J. said, That it was the opinion of *Holt*, C. J. that the sheriff should have fees for executing an *elegit*, but he said he doubted of that ; because it would be unreasonable when the whole debt is 500 l., and perhaps the land extended but 20 l. *per annum* ; that the sheriff should have fees for 500 l. *Treby*, C. J. said, That he should have fees according to the sum levied, and not according to the debt recovered, as upon a *feri facias*. To which *Powell* answered, That that could not be, because the party might detain the land till he was satisfied the entire debt, and the plaintiff is, by having made his election, barred of all other executions. 4thly, That the statute does not extend to executions upon statutes-merchant, recognizances, &c. for the act is to be understood of cases where the judgment *redditur in invitum*, and not by the voluntary confession of the party.

7. Earle *versus* Plummer.

[Pasch. 9 Will. 3. B. R.]

IF an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous. Fees due on erroneous writ. Cases B. R. 128. S. C.

8. Springate *versus* Springate.

[Pasch. 9 Will. 3. B. R.]

NO rule ought to be made for referring an attorney's bill delivered to his client, unless there be an action pending thereupon. Attorney's bill.

But now see the stat. 2 Geo. 2. for the better regulation of attorneys and solicitors.

9. Burdeaux *versus* Dr. Lancaster & al'.

[Hill. 9 W. 3. B. R.]

BURDEAUX, a French protestant, had his child baptized at the French church in the Savoy, and Dr. Lancaster, vicar of St. Martin's, in which parish it is, together with the clerk, libelled against him for a fee of 2s. 6d. due to him, and 1s. for the clerk. A prohibition was moved for, and Levinz urged this was an ecclesiastical due by the canon. Holt, C. J. Nothing can be due of common right, and how can a canon take money out of laymens' pockets? Lyndewode says, It is *simony* to take any thing for christening or burying, unless it be a fee due by custom; but then, a custom for any person to take a fee for christening a child, when he does not christen him, is not good; like the case in *Hobart*, where one dies in one parish and is buried in another, the parish where he died shall not have a burying fee. If you have a right to christen, you should libel for that right; but you ought not to have money for christening when you do not. No fees due for christening or burying, unless by custom, and then he must do the duty. Cases B. R. 171. S. C. Holt 327. Post, pl. 13. Hob. 175.

10. Ballard *versus* Gerard.

[Mich. 13 Will. 3. B. R. 1 Ld. Raym. 703. S. C.]

Register of spiritual court cannot sue there for fees. Cases B. R. 608. S. C. Holt 596.

Denial of just fees is a disseisin. 5 Mod. 242. 1 Mod. 167.

Vide pl. 2. ante, and auth. there cited.

THE register in an ecclesiastical court libelled there for 4s. 6d. for his fees, and proceeded to excommunication: The defendant came and suggested, That the office of register was a temporal office, and a freehold, and moved for a prohibition, which was granted; for the Court has no power to compel the party to pay fees to their officers, but they must bring their *quantum meruit*; or if the office be a freehold, they may bring an assise; for the denial of just fees is a disseisin. At another day Mr. Broderick moved to set aside the rule: He admitted it was otherwise for proctors' fees, because there is a remedy at common law upon the retainer; but said this was upon a different reason, because the party is a mere officer of the Court; and that the Court might appoint a reasonable fee to officers that attend them, and that it is not extortion any more than box-money; but the rule stood. *Vide* 2 *Keb.* 615. 3 *Keb.* 441, 516, and 303.

11. Gifford's *Case*.

[Mich. 1 Ann. B. R.]

Suit for fees in the ecclesiastical courts prohibited. 5 Mod. 238. 1 Mod. 167. *Vide* supra, pl. 2, 10.

GIFFORD was libelled against in the ecclesiastical court for fees, and upon motion a prohibition was granted, for no court has a power to establish fees; the judge of a court may think them reasonable, but that is not binding: but if on a *quantum meruit*, a jury think them reasonable, then they become established fees. *Vide Hardr.* 351.

12. Tyson *versus* Paske.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1212. S. C.]

For executing an *elegit*, debt lies. Holt 318. S. C. 209. S. C. by the name of *Jayson v. Rad*. *Vide* ante, pl. 6. Ante 209.

THE sheriff having executed an *elegit*, brought an action of debt for his fees: and it was objected, that this was not within the statute, that the execution is not complete, and the plaintiff cannot enter, but must bring his ejectment. Holt, C. J. said, There was the same reason for fees for executing an *elegit* as an extent. Upon an *elegit* the sheriff returns, that he has taken an inquisition, extended the lands, and delivered them to the plaintiff;

plaintiff; and there is a *liberate* in the body of the writ of *elegit*, and the plaintiff on this return may enter, for by the return he becomes tenant by *elegit*, and may maintain an ejectment, and assign his interest upon the land; but the defendant's continuing in possession after the return of the writ, turns the plaintiff's estate to a right, and therefore he must enter to assign. The execution is complete and perfect; and his being put to an ejectment is no reason; for in case of an extent upon a statute where the *liberate* is distinct, he cannot enter by force; it is true, he may without force; and so he may here: And *Powell* said, That extent generally is the word of the statute of *Elizabeth*, and that an extent upon an *elegit* was an extent within the statute, as well as an extent upon a statute.

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Vide stat 3 G.
15. 8 G. 25.

13. Dean and Chapter of Exeter's Case.

[Hill. 5 Ann. B. R.]

SERJEANT *Hooper* shewed cause against a rule for a prohibition to the spiritual court, to stay a suit there for a customary fee of 10*l.* due to the dean and chapter of *Exeter*, for burying in the cathedral church: *Sed non allocatur*; for no fee is due for burial of common right: But where a licence is necessary, the person giving it may stand upon his own price; and if there be such a custom, it is triable at common law. *Vide* 3 *Kemble* 527, 523. If the custom be not denied, the spiritual court shall proceed; for there is no other remedy: But if the custom be denied, a prohibition shall go; not *propter defect. jurisdictionis*, but *triationis*; and that burials at common law ought to be in the church-yard, and without fee. 2 *Keb.* 778. *contra*.

No fees due for burials unless by custom.

Ante, pl. 9.

Cart. 33.

Felonv.

Domina Regina *versus* Wallis.

[Oct. 14, 1703. *Coram* Holt, C. J. & al. Justic. apud le Old Bailey.]

If several make a riot, and a man is killed, they are all principals in the murder. 4 Co. 43. b. Holt 434. S. C.

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Vide Hawk. P. C. ch. 31. f. 46, 47. and note to f. 46. in 6th edition.

INDICTMENT against *A.* for the murder of *John Cooper*, and also against *B., C., D.,* and *E.,* as persons present, assisting, aiding, and abetting *A.* therein: *E.* being arraigned upon this indictment, pleaded not guilty; and upon evidence it appeared, that the person slain was a constable, and in the execution of his office with divers other constables in *May-Fair.* That *E.* the prisoner first drew his sword, and with divers others, to the number of forty persons, fell upon the constables; that this affray continued an hour after, till in the end one of the constables, viz. the said *John Cooper*, was slain; but by whose hand it did not appear. It also appeared that *A.* had been tried on this indictment and acquitted. *Et per Holt, C. J.* 1st, Though the indictment be against the prisoner for aiding, assisting, and abetting *A.* who was acquitted; yet the indictment and trial of this prisoner is well enough, for who actually did the murder is not material; the matter is, that a murder was committed, and the other is but a circumstance, and all are principals in this case; therefore, if a murder be proved, it is well enough.

2dly, If a man begins a riot, as in this case, and the same riot continue, and an officer is killed, he that began the riot, as the prisoner here did, is a principal murderer, though he did not do the fact.

Fences, Inclosures.

Star *versus* Rookesby.

[Mich. 9 Ann. B. R.]

ERROR was brought on a judgment by default in *C. B.* in an action on the case, wherein the plaintiff declared, that he was possessed of a close adjoining to the defendant's, and that the tenants and occupiers of that close had time out of mind made and repaired the fence between the plaintiff's and defendant's close, and that for want of repair the defendant's cattle came into the plaintiff's close, &c. *Et per Cur. :*

1st, Either trespass or case lies ; trespass, because it was the plaintiff's ground and not the defendant's ; and case, because the first wrong was a nonfeasance and neglect to repair, and that omission is the gift of the action ; and the trespass is only consequential damage.

2dly, This is a charge upon the defendant against common right ; for the law bounds every man's property, and is his fence, and this is obliging another to make a fence for him.

Gaime & Foresight, ante 10.

3dly, That where a charge is imposed on another, and that against common right, and the charge is laid on him as owner of the soil, or tertenant, the plaintiff in his declaration must make himself a good title ; but where he declares against the defendant as a wrong-doer only, and not as tertenant, it is sufficient that the plaintiff declares on his possession.

Pleader. C. 39. 5th vol. 3d edit.

4thly, That the plaintiff has made himself a sufficient title in this declaration, by shewing the defendant bound to this charge by prescription ; which prescription is sufficiently alleged ; for by *tenentes* is meant the owners of the fee-simple, and by *occupatores*, those that come in under them. That *tenentes* is so taken, appears by the writ *de curia claudenda* ; which is a writ of right, and lies only for a tenant in fee ; and as this is a charge upon the land, which runs with it, there is good reason why every occupier should be bound. And it is sufficient for the plaintiff to charge the *tenentes* and *occupatores*, because it is impos-

E c 3

sible

Case for suffering a fence between the plaintiff's and defendant's close to be out of repair, per quod defendant's cattle entered plaintiff's close, &c. lies. 1 Vent. 265.

Where a charge against common right is laid on owners of the soil, plaintiff must make title ; and a prescription is sufficient. Rep. A. Q. 168. S. C. Str. 5. Vide Potts v. and note thereto.

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Post 360.
5 Mod. 313.
1 Bur. 443.
Com. Dig.
pa. 347. Str. 5.

Prescription in *tenentes* & *occupatores* is well. 6 Mod. 4. Far. 55. Vide Hern. 72. Raft. 621, 622. 21 H. 6. 3. Raym. 192.

2 Cro. 665.
29 E. 3. 32.
3 Cro. 415.
2 Rel. Rep.
285. Dy 70.
6 Co. 99. Godb.
52. 2 Lev. 163.
4 T. R. 318,
719.

sible that he who is a stranger should be able to know and set forth their particular estates, titles, and interests; but the prescription is annexed to the *tenentes*, i. e. tenants of the fee: Yet on a *traverse* of the prescription it would be good evidence, that the tenants for years have from time to time fenced and repaired, for perhaps the estate has not since time of memory been in the actual occupation of the very owner of the fee. The judgment was affirmed.

1. Price *versus* Langford.

[Pas. 2 W. & M. B. R. Intr. Hill. 2 & 3 Jac. 2. Rot. 1059.]

1 Show. 92. S. C.
Fine over grant
and render is
tantamount to a
feoffment and
recoffment, and
creates a new
estate. Vide
post 590. 1 Inst.
353. Holt 253.

Vide Doug. 771.
(721.) Roe v.
1 Maccie, 5 T. R.
107.

H. Was seised in fee as heir of the part of the mother; he and his wife levied a fine to *A.* and *B.* with warranty; *A.* and *B.* by the same fine did grant and render the lands to the husband and wife in tail, remainder to the heirs of the husband: The husband and wife died without issue, and the question was, Whether the heir *a parte paterna* or *a parte materna* should take these lands? It was argued on the one side, that the seisin of the conusee is fictitious; for if the conusee were tenant for years, the term would not be thereby extinguished; and he is like to the surrenderee of a copyhold, nothing but a mere instrument: Therefore nothing is altered by the fine, but the use and estate remains as before. On the other side it was said, that the conusee could not render if he had not the estate in him, and that it is a re-infeoffment; and of this opinion was the Court, who held, that the estate was once in the conusee, and the fine and render is a conveyance at common law, and the render makes the conusor a new purchaser as much as a feoffment and re-feoffment at common law.

2. Winchurch *versus* Belwood.

[Pasch. 4 W. & M. B. R.]

ERROR being brought in *B. R.* of a fine in *C. B.*, the fine was affirmed; and now a writ of error, *coram vobis residen.* was brought here; and exception was taken, that the writ ought to abate, for that no such writ lies in this case, because only a transcript of the fine is removed into this court. And it was likened to the cases of error in the Exchequer Chamber, where only a transcript goes up, and if the writ abates, no writ of error *coram vobis* lies.

Show. 345. Error coram vobis lies upon an affirmation of a fine in *B. R.*

Sed per Cur. The reason of that is not because they in the Exchequer Chamber have only a transcript, but because they have only a particular authority to affirm or to reverse. It was * admitted, that a transcript of the record of a fine is only removed, because upon judgment of reversal a *certiorari* goes for the very foot of the fine, and it is cancelled. But, notwithstanding that, the Court held, that error *coram vobis residen.* lay (a).

Post 401.

Post 342. Post, pl. 6.

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(a) *R. contra Burleigh v. Harris*, *Rol.* 420. by which it appears the writ 2 *Str.* 975. It is there said, that this of error abated, and there was no affidavit case is not warranted by the record firmance, which is entered *Hil.* 3 & 4 *Jac.* 2.

3. Symonds *versus* Cudmore.

[*Hill.* 5 W. & M. Rot. 743.]

IN *ejectment* a special verdict was found, upon which the case was, Tenant in tail in reversion after a lease for years, remainder to tenant in tail in fee, made a lease to commence at a day to come, and died before the day, having issue; after the death of tenant in tail, but before the day, the issue levied a fine: In this case the whole Court agreed, that the remainder in fee stood chargeable with this lease, and it should have been served out of the remainder in fee, had tenant in tail died without issue. 2dly, It was held that the estate-tail was extinct by the fine, as much as if tenant in tail were dead without issue. 1st, Because two fees immediately expectant one upon another, cannot subsist in the same person. 2dly, Because by the 32 *H. 8. c. 36.* the fine is declared to be a bar and a discharge of the estate-tail. 3dly, Because the statute of *Westm.* 2. having made estates-tail a kind of particular estate,

Carth. 257. *S. C.* 2 *Salk.* 619. name of Symonds *versus* Cudmore. A tenant in tail, remainder to A. fee, makes a lease and dies before commencement, and the issue levies a fine, the lease is good against co-nusee. Estate-tail extinct by fine. *Cro. Elis.* 513. *Cro. Car.* 103. *Het.* 96. *Dier.* 107. 3 *D.* 169. p. 40, 41.

S. C. 4 Mod. 1. estate, they are (the protection of the statute being gone
1 Show. 370. by the fine) (a) like all other particular estates, subject to
Skin. 284, 317. merger and extinguishment when united with the absolute
3 Salk. 335. fee.
Cases B. R. 32.
Holt 666. 1 Lev. 168.

2 Leon. 37.
1 Rep. 51. b.
2 Cro. 689.
1 Cro. 478.
Hob. 258.
Dyer 115.
Plowd. 560.
1 Rep. 49. b.
2 Bulst. 45. W.
Jones 33. Cro.
Jac. 455. Cro.
Eliz. 718.
Plowd. 436.

Tenant in tail, remainder to the king; tenant in tail makes a lease for years, and is attainted, the king shall avoid the lease; for the estate-tail is as much gone by merger, as if tenant in tail was dead without issue.

If there be tenant for life, reversion to A. in fee, and A. makes a lease for years, and then tenant for life and he in reversion join in a fine, the lease shall take effect presently; not but that the estates passed severally, according to *Bredon's case*; but they are now consolidated; or else, if the conusee should die during the life of the conusor, there would be an occupant.

Dyer 51. b. 279.
46. 1 Roll.
Rep. 190.
2 Cro. 454, 458.
Bridgm. 28.
3 Rep. 84, 85.

Eyre, Gregory, and Dolben denied **1 Inst. 46. b.** and held the issue in tail had election to avoid or affirm the lease, and that by *Westm. 2.*, but that the conusee had not; for the power and privilege is personal, and cannot be transferred.

In this *Holt, C. J.* differed; he held the lease actually void *quoad* the issue, as if tenant in tail make a lease to commence after his death; and that as by law no act is necessary to be done to avoid the lease, so the fine does not prevent its being void (b).

(a) A fine *sur grant et render* is the only fine that gives a new estate, for upon a fine *sur conusans*, &c. the old use remains. *Abbot v. Burton*, **2 Salk. 590. Cruise 38.** In *Martin ex dem. Tregonwell v. Strachan*, **1 Will. 2, 66. 2 Str. 1179. 4 Bro. P. C. 486.**; but most accurately stated in a note to **5 T. R. 107.**; a person seised in tail by purchase, remainder in tail, remainder to himself in fee by descent *ex parte maternâ*, suffered a recovery, and declared the use to himself and his heirs: It was adjudged that the heirs *ex parte paternâ* were entitled, a pure fee-simple arising from the estate-tail, and nothing from the remainder. In *Roe dem. Crow v. Baldwere*, **5 T. R. 104.**, a person being seised in tail of lands by purchase, under a settlement made by an ancestor *ex parte maternâ*, and of others by descent *ex parte maternâ*, suffered a recovery, wherein the uses were limited to her right heirs. The part which she took by purchase was ad-

judged to go to the heir *ex parte paternâ*; and that which she took by descent from the maternal ancestor, to the heirs *ex parte maternâ*. Part of the property being copyhold, it was argued that the legal estate of that vested in the recoveror, and broke the descent; but the Court over-ruled the distinction. When a person was seised of the legal estate by descent *ex parte maternâ*, and the trust by descent *ex parte paternâ*, the maternal heirs were held entitled. An infant being entitled by special occupancy as heir *ex parte maternâ*, the guardian took a fresh lease to her and her heirs for three lives; the infant dying, the heirs *ex parte paternâ* were held entitled. *Mason v. Day*, **Pres. Cb. 319. Vide Harg. Co. Lit. 12. b. 14 Vin. Ab. 286.**

(b) The operation of a fine and a recovery on questions of this kind is extremely different. If a tenant in tail, with a reversion in fee to himself, levy a fine, the effect of that on the estate-

estate-tail is creating a base fee; and that becomes merged in the other fee, and lets in all the incumbrances of the ancestor; which has frequently happened in practice, from a person being ill-advised to levy a fine instead of suffering a recovery. *Per* Ld. *Kenyon*, in *Roe dem. Crow v. Baldwre*, 5 T. R. 109. Accordingly, in *Earl of Shelburne v. Biddulph*, 4 Bro. P. C. 594., *A.* tenant in tail, remainder to *B.* in tail, remainder to *A.* in fee, made a lease for three lives, with covenant for

perpetual renewal; *A.* died without issue, and *B.* levied a fine, and the covenant was adjudged to bind the fee. So if tenant for life, with remainder to his son in tail, and the reversion in fee in himself, becomes indebted by bond, or incumbers the estate in any other manner; if after the death of such tenant for life his son levies a fine, it will let in the reversion in fee, and make it liable to all his father's incumbrances, *Cruise* 148. *Kinaffon v. Clark*, 2 Atk. 204.

4. Anonymous.

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[Hill. W. 3. B. R.]

PER Curiam : The Court will not reverse a fine without a *scire facias* returned against the tertenants; for the conusees are but nominal persons: And though it was otherwise in the precedent in *Co. Ent.* and *Hern's Plead.* 375., and the law perhaps does not strictly require it, yet the course of the Court does.

On error to reverse a fine, Sci. fa. must go against tertenants. Post 598.

5. Hunt versus Bourne.

[Hill. 1 Ann. B. R.]

IN *ejectment* in *C. B.* the jury found a special verdict: That the lands in question were holden of the manor of *Wormelow*, which is *de antiquo dominico corona domini regis & antecessorum suorum*, impleadable in the court of the manor *per parvum breve de recto clauso coram seneschallo sectatoribus & domesmen' ejusdem manerii frue eorum locum tenen. & attornat'*; and that upon writs of right-close, fines have been time out of mind levied and leviable in the same court: That *Thomas Guillym* was seised in tail of the said lands, and being so seised, 25 *Maii*, 22 *Car.* 1. a fine was levied in the said court, *secundum consuetud. predict.* before *A. B. locum tenen. Willielmi Kyrle seneschalli & R. attornat. J. S. & W. attornat. J. N. adiunc sectator. & domesmen. ejusdem Cur'*; by which fine the said *Thomas Guillym* confessed tenementa *predict.* to one *Nurse* for life, rendering rent, &c. Then the fine was set forth in *hec verba*, and it appeared to be levied before the attornies of the suitors, *in placito conventionis secundum consuetudinem manerii, comeceo que il ad de son done*, with warranty. Then they found that the said lands were not accustomedly letten, and that this

1 Lut. 779. S. C.
2 Saik. 422.
called Hunt vers.
Burn. Ante 579.
244. Comyns
93.

Vide Cruise on
Fines 50.

this was not the ancient rent: That *Nurse* entered, and afterwards, 24 *Car.* 1. the said *Thomas Guillym* and his wife levied a fine with warranty, to the use of the husband and his heirs; that afterwards, the same year, the said *Thomas Guillym* bargained and sold the said lands to *Paine* and his heirs, under whom the defendant claimed: That afterwards he released to *Paine*, and that *Paine* died in 1661. That *Guillym* died in 1663. That thirty years afterwards, viz. 1693, *Nurse* died; and Whether the entry of *Richard Guillym*, grandson and heir in tail of *Thomas*, the consor of both fines, be lawful upon the purchaser? was the question; which in *C. B.* was determined in the affirmative, and *Richard* had judgment; and now upon a writ of error in *B. R.* that judgment was affirmed *per totam Curiam seriatim*, after many arguments at bar. And these points were resolved,

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Mise joined in a writ of right may be tried in that Court.

1st, That tenant in tail of ancient demesne lands may levy a fine of those lands in the court of ancient demesne, although it be no court of record, because it is but agreeable to the power of that court, in like instances; for they may proceed to try the *mise* joined in a writ of right-close, which is of a higher nature than a fine. *Dy.* 111. pl. 47. Whereas in all other inferior courts on the *mise* joined, the cause must be removed into *C. B.* by *recordari*. *F. N. B.* 12. And the 18. *E.* 1. is but declarative of the common law, and was made to rectify a mistake, viz. that fines were leviable in inferior courts upon bills or complaints, which now cannot be either by grant or custom, by reason of the negative words of that statute; but this does not extend to ancient demesne courts, for then this statute would make fines of those lands leviable in the court of Common Pleas; whereas they are not, but reversible by writ of *disceit*; so that they would be under a double disadvantage, that a fine would not be leviable of the land any where if not in this court of ancient demesne; whereas that which is their privilege could never be intended to be to their disadvantage (a).

Fine may be levied in any real action, and the writ of covenant on which a fine is levied, is such. *Cruise* 10.

2dly, That a fine may be levied on a writ of right-close, or in any real action, but not on an original in a personal action; and that the common writ of covenant, on which a fine is levied, is not a personal but a real action; for though it is to have damages for breach of covenant, as in personal actions, yet it is to have an execution and performance of the covenants. *Vide* 5 *Co.* 59. *F. N. Br.* 146. f. 2 *Inst.* 514. 1 *And.* 71. *Kel.* 90. b. 4 *Inst.* 207, 270.

(a) Fines may be levied in the courts of cities and corporate towns by custom, where such courts have power to hold pleas of land. *Cruise* 52. *Blad. Form. Ang.* No. 379, 394-

3dly, That

3dly, That a fine levied in the court of ancient demesne may work a discontinuance, though the court is not a court of record; for the discontinuance is, because the freehold is recovered in the action; for every recoverer recovereth a fee-simple, and a recovery of the fee-simple must work a discontinuance; and if this be allowed to be a fine, in consequence it ought to have the effect of fines. But *nota*; Though such fine be a discontinuance, it is not a bar to the intail; for it is by the 4th of *Hen. 7.* that a fine with proclamations shall bar an estate-tail (a), and no fine but a fine with proclamations is within that statute, nor can bar an estate-tail. And the Court denied a fine to be a feoffment of record, and said it was improperly so called, but that the meaning was, that it had the effects of a feoffment to some purposes, if he that levied the fine was seised of the freehold at the time of the fine levied (b).

Fine in ancient demesne works discontinuance, but no bar.

Why fine called a feoffment of record.

4thly, That a fine *sur consueance de droit come ceo que il ad de son done* generally implies a fee-simple; but it is only by implication, and therefore there is no repugnancy to limit an estate for life to the conusee; for the precedent donation of feoffment which is supposed might be for life only, or in tail, and the general intendment of the *consueance*, may be qualified by an exprefs limitation. *Vide 41 E. 3. 14. Co. Lit. 9. b.*

Fine *sur consueance, &c. come ceo, &c.* implies a fee-simple, but that may be qualified to a particular effect.

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5thly, That the suitors, who are judges, might act by attorney, because it is a part of their service *ratione tenurae*, and they are judges *quatenus tenants*. *Quilibet liber homo qui secliam debet libere possit facere attornatum suum ad secliam suam pro se faciend. Stat. Merton. c. 10.* And this is part of his suit. *Vide 2 Inst. 225. F. N. B. 25. 156.*

There was another point in this case, *viz.* Whether it appeared by the verdict that the issue in tail was barred of his *formdon* by 21 *Jac. 1.*, and if so, Whether he had lost his right of entry also. But for the resolution of that, *vide Post 422.* this case, title *Limitations (c).*

(a) The statute only mentions "fines levied in the King's Court afore his justices of the COMMON PLACE."

(b) According to a MS. note of this case, mentioned 18th *Vin. 413.* Lord Chief Justice Holt said, That if a tenant for years makes a feoffment in fee, the whole estate of him in the reversion is devested, but if he levy a fine, *nihil operatur*. The distinction laid down in this case between a fine and feoffment is approved by Lord Macclesfield in *Carter v. Barnardiston, 1 Wms. 519.*; Ld. Ch. J. Lee, *Smith ex dem. Dormer v. Packhurst, 18 Vin. 413.*; and by Ld. Ch. J. *Willis*, in giv-

ing judgment in the same case in the House of Lords, 3 *Atk. 135.*, who says, that a fine is a feoffment upon record when the party hath such an estate as will enable him to levy a fine, that is, an estate of freehold; otherwise a fine has no effect whatsoever with respect to a stranger, and operates as an estoppel only, and bars none but the party claiming under it. In 2 *Com. 348.* it is said, it may be called with more accuracy an acknowledgment of a feoffment upon record. *Vide Inst. 49, 50. Cruise 33.*

(c) The judgment in this case was affirmed in *Dem. Proc. 1 Brown P. C. 53.*

6. *Fazacharly versus Baldo.*

[Trin. 3 Ann. B. R.]

Ante, pl. 2.
Writ of error of
fine removes only
a transcript. S.C.
Mod. Cases 177.
Post 352.

PER Holt, C. J. If a writ of error be brought in *B. R.* to reverse a fine levied in *C. B.*, the very record of the fine itself is never removed hither, but only a transcript of it: But if this Court adjudge it erroneous, then a *certiorari* goes to the chirographer to certify the very fine, and when it comes up it is actually cancelled.

7. *Lloyd versus Viscount Say and Seal.*

[Mich. 10 Ann. B. R.]

Fine is of the
term the concord
was made.
Ante 2, 209.

2 H. Bl. 62.

A Fine was thus: *Hec est finalis concordia facta in Cur. Regis apud Westm., a die Sancti Michaelis in tres septima anno decimo Willielmi tertii coram Thom. Trevor, &c., & postea in crast. Sancte Trinitat. 1 Anne concess. & recordat. coram ejusdem justiciar.*; so that the concord of the fine was of one term, and the *recordat.* of another term following; and therefore the question was, Of which term this should be said to be a complete fine? *Per Cur.* It is a fine of that term when the concord was made, and of which the writ of covenant was returnable, for the *concordia facta in curia* is the complete fine; the *concessit recordat.* is the leave of the Court to enrol it. 6 Co. 68. *Hob.* 330. 2 *Ken.* 47.

N. The judgment in this case was affirmed in *Dam. Proc.* 1 Bro. P. C. 383.

1. *Dominus Rex versus Stocker.*

[Mich. 7 Will. 3. B. R.]

S. C. 5 Mod.
137. Fabricavit
seu fabricari cau-
savit, ill in in-

AN indictment, for that the defendant *fabricavit seu fabricari causavit* a bill of lading, was held naught upon demurrer; for an indictment ought to be certain and positive.

positive (a). Co. Ent. 477. 1 Sid. 134. 2 Cro. 345. dictment. Post 371. 2 Lill. 46.
2 Ro. 272. cont. 2 Ro. 82. 4 Rep. 48. a.

2 Hawk. ch. 25. f. 58.

(a) R. acc. Rep. B. R. Temp. Hard. 370.

2. Domina Regina *versus* King.

[Hill. 1 Ann. B. R.]

INDICTMENT for forging *quoddam scriptum obligatorium* of J. S. Objection, it should be *scriptum*, purporting a writing obligatory of J. S. : *Sed non allocatur* ; for the fifth of Eliz. c. 14. mentions false deeds, as well as false writings.

For forging a deed of J. S. Far. 150, 151. S. C. 1 Hawk. 183, &c. 2 Hawk. 287. 2 Lev. 111, 221. 3 Leon. 170. 3 Salk. 171, 172. Holt 326. 1 Vent. 24.

3. Domina Regina *versus* Smith.

[Paf. 2 Ann. B. R.]

INDICTMENT for forging a deed of assignment of a lease, signed with the mark of one *Goddard, cujus tenor sequitur*, but sets not down the mark as in the assignment ; and this was objected, for that without *that* it could not be a forgery ; *sed non allocatur*.

Indictment for forging a deed with the mark of J. S. Mark need not be set forth.

1. Domina Regina *versus* Taylor.

[Trin. 1 Ann. B. R.]

MR. Lovell moved against the keeper of the prison of the Gatehouse for not returning a *habeas corpus* for bringing up prisoners in order to be sent to *Newgate*, the county gaol: Upon this occasion, *Holt*, C. J. laid it down, That none can claim a prison as a franchise, unless they have also a gaol-delivery of felony, which the dean and chapter

Where there is a franchise of a prison there must be a gaol delivery. Far. 31. S. C. Holt 330.

chapter of *Westminster* hath not, and therefore ought to send a calendar of them to *Newgate*, or return the *habere corpus* to this court, with a claim of their franchise.

2. *Rush versus* The Chancellor and Scholars of Oxford.

[Trin. 1 Ann. B. R.]

Franchise of the university of Oxford. 2 Salk. 450.

MR. *Cowper* moved for a prohibition to a suit in the vice-chancellor's court against certain brewers, for selling ill beer and false measure; and the particular excess of jurisdiction alleged was, the exacting juratory caution; and he also insisted, that though they have the assise of bread and beer by charter, yet a power to punish by fine, and proceed according to the civil law, cannot be by charter. *Holt, C. J.* Before the 14 H. 8. the university had the jurisdiction of a leet, and exercised it in the vice-chancellor's court; but the charter of the 14 H. 8. grants them power of trespasses, and that over all persons whatsoever, if a scholar be party. *Adjournatur.*

1. *Pope versus* St. Leger.

[Mich. 5 W. & M. Rot. 337.]

Carth. 322.
St. Leger vers.
Pope. Wager
concerning the
right manner of
playing, not
within the sta-
tute. 4 Mod. 1,
409, 410.
5 Mod. 1, 4.
2 Mod. 54, 179.

AT play at backgammon, one of the players stirred one of his men, but it did not move it from the point; and the question was, Whether he was bound to play it? On this a wager of 100*l.* was laid, and the determination referred to the groom-porter; and now in an action, the question was on the statute against gaming, Whether this was within the statute (a)? And it was held this wager was not prohibited by the statute, for it was not on the

(a) *St. 16. Ch. 2. ch. 7.*

chance

chance of the play, but on the right of the play, which is a collateral matter (a).

S. C. N. L. 143. Skin. 371. Carth. 322. Comb. 327. Cases B. R. 81. Holt 550.

(a) Horse-races for smaller sums than 50*l.* being prohibited by statute 13 Geo. 2. ch. 19. s. 2., it was ruled in *Johnson v. Bann*, 4 T. R. 1., that wagers concerning them are illegal. As a general proposition, wagers are legal contracts upon which an action may be maintained; but with the exception of such as tend to a breach of the peace, or to immorality, or the introduction of indecent evidence, or affect the interest and feelings of a third person, or are against sound policy; as a wager between two voters concerning the event of an election, which might be made a cover for bribery, *Allen v. Haarn*, 1 T. R. 56.; or wagers concerning the sex of any person, *Da Costa v. Jones*, Cowp. 729.; or the amount of any branch of the public revenue, which might lead to a discussion attended with mischievous con-

sequences, *Aiberfold v. Beard*, 2 T. R. 610. Lord *Loughborough* refused to try a cause on a wager respecting the mode of playing at hazard, which is a prohibited game, and his refusal was confirmed by the Court of Common Pleas, 2 H. Bl. 43.

Qu. If a wager whether war would be declared in a given time, is legal? *Foster v. Thackeray*, 1 T. R. 57. n.

An action may be maintained on a wager whether a person bought a wagon, though it was objected that it might tend to introduce evidence whether he stole it, *Good v. Elliot*, 3 T. R. 693.: Or concerning the decision of an appeal in the House of Lords; but if such a wager was intended to colour bribery, or produce improper conduct, it would be void, *Jones v. Randall*, Cowp. 37. *Vide Lynall v. Longbottom*, 2 Will. 35.

2. Hufsey versus Jacob.

[Mich. 8 Will. 3. B. R. Comyns 4. S. C. 1 Ld. Raym. 87.
S. C. Pleadings, 3 Ld. Raym. 93.]

THE Lord *Chandos* lost money at play to *Hufsey*, and gave him a bill for it on *Jacob*, who accepted it, and afterwards refused to pay; and now an *assumpsit* was brought against *Jacob*, and he pleaded the 16 Car. 2. c. 7. To which it was demurred: And, 1st, it was objected, that this amounted to the general issue: *Sed Curia contra*; for where the matter of the plea confesses the cause of action, but avoids it, the defendant may plead specially, though he might have given it in evidence; otherwise where the matter of the plea does not avoid but deny. 3 Cro. 871. Second objection; This is out of the statute, because the nature of the duty is altered, and a new contract created by the acceptance, which is the ground of this action: *Sed non allocatur*; for though this is a kind of new contract, yet all is founded on the illegal and tortious winning, and only secures the payment of that money, and therefore it is within the statute, the plaintiff being privy to the first wrong: but if *Hufsey* the plaintiff had assigned this to a stranger *bona fide* upon good consideration,

2 Kelynge 269,
270. 5 Mod.
170. Winner
shall not recover
on a bill for
money won at
play against an
acceptor; other-
wise of an in-
dorsee. Carth.
356. S. C.
Holt 328.
Cases B. R. 96.
Skin. 195.

Where matter
amounting to
the general issue
may be pleaded
specially. Mod.
Cases 128. Post.
pl. 4. 2 Mod.
279. Hob. 127.

Cro. Eliz. 871.
Fost. 394.

sideration, he had not been within the statute, for he was not privy to the tort, but an honest creditor (a).

N. B. Holt, C. J. put these cases: *A.* loses 100 *l.* to *C.*, and *A.* and *B.* become bound to *C.* for the money, the bond is void as to both (b). I know but one case where it shall not be void, which has been adjudged both on the statute of gaming and usury; if *A.* wins 100 *l.* of *B.*, and for a debt which *A.* owes *C.*, he appoints *B.* to give *C.* a bond, it is good: *C.* is an innocent person, and it will be the same thing if *A.* be bound with him.

(a) By statute 9 *Ann.* ch. 14. s. 1. All securities, the whole or any part of the consideration of which is for money won by gaming, or repaying money lent for gaming, are rendered void; which provision is ruled to extend to bills or notes in the hands of an innocent indorsee, for a valuable consideration without notice. *Bowyer v. Bampton*, 2 *Str.* 1155. (The same

was ruled with respect to bills void for usurious considerations, under statute 12 *Ann.*, *Lowe v. Waller*, Doug. 735.) But though the security is void in case of money lent to play with, the contract is good and binding. *Burgen v. Walmsley*, 2 *Str.* 1249. *Robinson v. Bland*, 2 *Bur.* 1077. 1 *Bl.* 234. Vide *Blaxton v. Pye*, 2 *Wilf.* 309.

(b) *Ac.* 1 *Wilf.* 220.

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3. Anonymous.

[Mich. 12 Will. 3. B. R.]

Several contracts. 1 Sid. 394.

AT play, *H.* may lose 100 *l.* to one, and 100 *l.* to another, upon tick, because it is a several contract; otherwise if it were a joint contract. It was held in the case of *Danvers* and *Thistleworth*, that if *H.* loses 2000 *l.* in ready money, and afterwards loses 100 *l.* more, for which he gives his note, the note is good; but all beyond it is void; *per Holt*, C. J.

4. Dickson *versus* Pawlet.

[Mich. 13 Will. 3. B. R.]

Assumpsit for 40 *l.*, plea, won at play, and at the same sitting he lost 66 *l.* to J. S., ill. 1 *Lut.* 130, 180. 3 *Keb.* 672. 2 *Vent.*

THE plaintiff brought *assumpsit* for 40 *l.*; defendant pleaded it was for money won at play, and that at the same time and sitting (c) he lost also 66 *l.* to J. S.; plaintiff demurred and had judgment, for it was the opinion of the Court, that losing 106 *l.* to several persons at one sitting, is not within the statute, unless they go shares

(c) To lose at one sitting, is to lose not be actually gaming the whole in a course of play where the company while. *Bones v. Booth*, 2 *Bl. Rep.* never parts, though the person may 1126.

fraudu-

fraudulently, and join in the stakes: For then, as to the chance of the game, they are as one person.

N. B. As *Holt*, C. J. put this case: Suppose the 40*l.* had been fairly won, and the 66*l.* with false dice, this will not avoid the 40*l.* debt, unless he was party to the fraud.

175. 4 Mod.
409. 3 Lev. 118.
5 Mod. 13, 357.
Mod. Cases 128.

Gaol.

Tiliden *versus* Palfriman.

[Mich. 3 Ann. B. R.]

IF one be *in custod. mar.*, the way to charge him with an action is thus, *viz.* in term-time the plaintiff must file a bill against him, and deliver a declaration to the turnkey, and then he shall lie two terms before he shall be discharged, even on common bail; but if it be in vacation (*a*), then the plaintiff must go to the marshal's book in the office and make an entry, *quod remanet in custodia ad seclam, &c.*; and this is sufficient to charge him, provided he be then in actual custody; for if he be out of gaol, then he may be arrested. *Per Cur'.*

Course of charging a prisoner in custody with an action. Mod. Cases 22, 63, 95, 154, 253. S. C. ante 213.
3 Salk. 150.
2 Crompt. Prac. 1., &c.

(*a*) *Vide* note to this case, p. 213.

Grants.

James M.
J. Germain et Ux. versus Orchard.

[Mich. 3 W. & M. B. R.]

Leffee for years
 grants the land,
 habendum for
 the residue after
 his death; term
 vests presently,
 and habendum
 is void. 3 D.
 210. p. 17. S. C.
 3 Salc. 222.
 Skin. 528.
 Holt 331. Cases
 B. R. 31.

Incident. Gills
5/17/18 7/14/11

Termor grants
 or devises gene-
 rally, grantee is
 tenant at will,
 devisee has the
 term—

Skin. 528.

IN trespass *quoad* the *vi & armis, non cul.* was pleaded, and issue was thereon, and as to the other part of the trespass to such a time, the statute of limitations; upon which there was a demurrer; and as to the residue, a justification and issue on it, and a *venire* to try that, and inquire of the damages on the demurrer: Accordingly there was an inquiry of damages as to the issue, but not upon the demurrer; and as to that the plaintiff entered a *non prof.*, and took judgment for the other. The case, upon the justification, was found by special verdict to be this, viz. lessee for 1000 years by deed, reciting the original lease of the lands, grants the said lands, together with the said recited lease to the grantee, his executors, administrators, and assigns, and all writings relating to the premises, *habendum* to the grantee, his executors, &c. after the death of the grantor and his wife for the residue of the term of 1000 years.

Per Holt, C. J. If a termor grants the land, the grantee is but tenant at will; for it does not appear that the grantor meant to pass his whole interest, and this is enough to satisfy the grant; but if a termor devises the land, all his term passes; for the devisee cannot be tenant at will, because the devisor must die before the devise can take effect, and one cannot be tenant at will to a dead man: Also he agreed the word *lease* would pass the term, but here it is the recited lease, which can signify nothing but the deed, therefore he held the *habendum* void; *aliter* had it been a grant of the term, *habendum* after his and his wife's decease, for there the *habendum* should be rejected as repugnant, and that being rejected, there would be enough in the premises to pass the estate, but here was nothing in the premises that could pass the term. And as to the issue on the *vi & armis*, on which nothing was found, he held that was only form, and that not finding damages on the demurrer was helped by the *non prof.* entered as to them. And judgment was given for the plaintiff,

plaintiff, and upon that judgment a writ of error brought in the Exchequer-chamber, where it was reversed; and the Court there held, that by the grant of the lands in the premises to the grantee, his executors, administrators, and assigns, the whole term of 1000 years was transferred; and since by the premises the whole term passed presently, but by the *habendum* not till after the death of the grantor and his wife, *ex consequenti* the *habendum* was repugnant to the premises, and void. And in *Trinity term 6 W. & M.* the judgment of the Exchequer-chamber was affirmed in the House of Peers.

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N. B. In this case a difference was taken between the opinion of a grant and a devise; if *A.* grants to *B.* generally, the term is in him only at the will of *A.*, but such a devise passes the whole term to *B.*, else he would have nothing; for should it be like a grant at will only, then the will could not commence till the death of *A.*, and so *instante* it would be determined by his death.

Habeas Corpus.

1. Dominus Rex *versus* Kendal and Roe,

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 65. S. C.]

UPON a *habeas corpus* to the keeper of *Newgate*, it was returned, that the defendants were committed by Mr. Secretary *Trumball* for high treason, in aiding Sir *James Montgomery* to escape, who was committed to the custody of a messenger for suspicion of high treason. And upon exceptions taken to the return, the Court held, 1st, That secretaries of state might commit (*a*), as conservators of the peace did at common law; and that it was incident to the office, as it is to the offices of justices of peace, who are not authorized by any express words in their commission to that purpose, but do it *ratione officii*. *Vide* 1 *And.* 297. 2 *Leon.* 175. 2dly, That the commitment of Sir *James Montgomery* to a messenger was good, and a lawful custody, for they would intend it only

Commitment for treason, in aiding the escape of H. committed for treason, ought to specify the treason for which H. was committed. 1 *Leo.* 70, 71. *Vide* 1 *Lill.* 3. *Skin.* 596, 597. *S. C.* 5 *Mod.* 78. *Comb.* 343. *Holt* 144. *Cases* *B. R.* 82. *Carth.* 299. 2 *Will.* 158. 1 *Bur.* 460. 1 *Str.* 2.

(a) *Vide* notes to 2 *Hawk.* ch. 16. s. 4. 6th ed.

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in order to carry him to gaol. And *Holt*, C. J. said, It had been held by *Hale*, C. J. that if a justice of peace direct a warrant to any particular private person, he might execute it; and supposing the commitment ought to have been to the county-gaol, yet the want of that would not make the warrant void. 3dly, That Sir *James Montgomery's* treason ought to have been inserted in the warrant, with an allegation, that Sir *James* did the fact; because the defendants, by breaking the prison, are guilty of the same specific treason and offence; and for this cause they were bailed.

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2. Bethell's Case.

[Trin. 7 Will. 3. B. R. S. C., but differently reported: 1 *Ld. Raym.* 47.]

5 Mod. 19. If commitment in execution by court of oyer and terminer be wrong in form only, the defendant not discharged on habeas corpus, but put to his writ of error. *Holt* 145. S. C. Commitment ought to be to the sheriff. *Post.* 350.

THE defendant being indicted for buying and selling of old money, was convicted at the *Old Bailey*, and fined 100*l.* And now, on a *habeas corpus* directed to the keeper of *Newgate*, was returned, that he was committed by order of the Court of Sessions at the *Old Bailey* to his custody, *tenor cujus ordinis sequitur in hac verba, viz. Wilhelmus Bethel convictus, &c. ideo consideratum est*, that he be fined 100*l.* & *quod ibidem, viz. in custodia* of the keeper of *Newgate in gaola remaneat sub salva custodia quosque fines persolvat.*

It was held *per Cur'*, that this commitment was naught; 1st, Because it was not to the sheriff, who is the legal and immediate officer to every court of *oyer* and *terminer*. 2dly, Because the word *committitur* is necessary to the form of a legal commitment.

Then the question was, Whether he could be discharged? *Et per Cur.* Before *Bushe's* case no man was ever, by *habeas corpus*, without writ of error, delivered from a commitment of a court of *oyer* and *terminer*; but this commitment was not causeless: Where a commitment was without cause, a prisoner may be delivered by *habeas corpus*; but where there appears to be good cause, and a defect only in the form of commitment, as in this case, he ought not to be discharged.

And, as to the other matter, they said, that though the commitment ought in strictness to be to the sheriff, yet a gaoler is a known officer in law, and his custody is the custody of the sheriff to many purposes; therefore let him bring his writ of error, for we will not discharge him on the *habeas corpus*.

3. Bracy's Case.

[Mich. 8 W. 3. B. R. 1 Ld. Raym. 99, 153. S. C.]

BRACY being committed by commissioners of bankrupt, brought a *habeas corpus*, whereon the commitment was returned, and this exception taken, that it was, *That he be committed to prison, there to remain till he conform himself to our authority*: The case was, That he refused to answer to such questions and interrogatories as they put to him, relating to the bankrupt's estate. And the statute empowers the commissioners to commit in that case till *he submit himself to be by them examined*. And the Court held the word *conform* instead of the word *submit* to be well enough, because it was of the same sense; but because the commissioners had other authorities besides that of examining, and it did not appear but it might require a submission to them in other respects, and for that all powers given in restraint of liberty must be strictly pursued, and in this case they had but a special authority, and must not exceed it, they held the return naught (a).

5 Mod. 308.
Commitment by
commissioners of
bankrupt till the
defendant conform
to their authority,
ill. Post.
pl. 11. Mod.
Cases 75 Comb.
390. S. C.
Sett. and Rem.
234. Holt 94.

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(a) *Vide Str.* 880. 2 Bl. R. 806, 1141. 2 Hawk. ch. 16. f. 18., and notes to said section in 6th edition.; where it is stated that commitments grounded upon acts of parliament must pursue the conclusions which the statutes prescribe. And where a man is committed as a criminal, the conclusion must be until he be delivered by due course of law. If he be committed for contumacy, it should be until he comply.

4. Anonymous.

[Hill. 8 Will. 3. B. R.]

IF the Chief Justice of the King's Bench commit one to the marshal by his warrant, he ought not to be brought to the bar by rule, but by *habeas corpus*; per Holt, C. J.

Commitment by
Chief Justice of
B. R.

5. King versus Clerk.

[Hill. 8 W. 3. B. R. Comyns 24. S. C.]

UPON a *habeas corpus* directed to the keeper of Newgate, to bring up the body of Clerk, it was returned, That in London there are companies, some freemen of those companies are liverymen, and that there is a court of aldermen, and that any one duly chosen, and not taking

5 Mod. 319.
Where there is a
commitment by
warrant, the office
must return the
warrant; otherwise of

commitments by
Court to a pro-
per officer in
execution. Holt
430. S. C.
Com. 411.
3 Salk. 92.
Cases R. R. 113.

ing upon him the office of a liveryman, may by custom be committed by the court of aldermen to any officer of the city; and that he being before the court of aldermen and refusing, the court committed him by warrant in writing to the keeper of *Newgate*, until he should declare he would consent to take upon him the office of liveryman; and it was resolved,

1st, That the Court of King's Bench takes notice of a liveryman, and the nature of his office, and that he, who comes into a company, agrees to incident charges and duties; and it was admitted, a corporation might have a power to commit by custom, though not by a charter or by-law.

2dly, They held that they could not take notice, that the keeper of *Newgate* was an officer of the city of *London*, and therefore it does not appear they pursued their authority: The sheriff is their proper officer, and they should commit to him. And *Holt*, C. J. said, In case of a nonconformist coming within five miles of a town that sends members to parliament, the party was discharged; because it did not appear that *London* sends burgesses to parliament, though all the world knows they do. 5 *Mod.* 162.

3dly, Where a commitment is in court to a proper officer there present, there is no warrant of commitment, and therefore he cannot return a warrant *in hac verba*, but must return the truth of the whole matter under peril of an action; but if he be committed to one that is not an officer, as in this case, there must be a warrant in writing, and where there is one, it must be returned; for otherwise it would be in the power of the gaoler to alter the case of the prisoner, and make it either better or worse than it is upon the warrant; and if he may take upon him to return what he will, he makes himself judge; whereas the Court ought to judge, and that upon the warrant itself.

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6. Anonymous.

[Mic. 11 Will. 3. B. R.]

H. brought into
B. R. shall not
be removed into
any other court
till he has an-
swered.

IF one in prison in the Counter be removed into the King's Bench by *habeas corpus ad respond.*, and, intending to go over to the Fleet, procures some friend to bring a *habeas corpus* to remove him thither; he shall not be removed thither till he has answered to the cause here, and he shall not compel the plaintiff to follow after a prolling defendant, and so *vice versa* of the Common Pleas; each Court shall retain the defendant in which he is first attached,

1 Will. 248.

tached, and after he has answered there, you may carry him where you will. This is fit to be the settled course, if there be any difference between the two Courts.

7. Dom. Rex *versus* Fowler.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 586. S. C.]

FOWLER was brought up upon a *habeas corpus* directed to the sheriff or gaoler; whereupon was returned the warrant from the sheriff for taking him, and that was upon a writ of *excommunicato capiendo*, for subtraction of tithes and other ecclesiastical duties: And Holt C. J., and the Court, held,

Habeas corpus quashed because directed to the sheriff or gaoler in the disjunctive. S. C. 3 D. 293. p. 4. 295. p. 2. 296. p. 3, 4. Cases B. R. 418.

1st, That the *habeas corpus* being directed in the disjunctive to the *sheriff* or *gaoler* was wrong, and that all the precedents were otherwise. That where a man is taken on a warrant of the sheriff, in pursuance of a writ to the sheriff, the *habeas corpus* ought to be directed to the sheriff, for the party is in his custody, and the writ itself must be returned. Otherwise it is, where one is committed to the gaoler immediately, as in cases criminal.

Ante 348. Vide 293.

2dly, The writ of *excommunicato capiendo* itself ought to be returned; and it is not sufficient to return the warrant, because the warrant may be wrong when the writ is right; and though the warrant may be wrong, yet, if the writ is right, the party is rightfully in custody of the sheriff. And for these reasons the writ was quashed.

8. Anonymous.

[Trin. 12 Will. 3. B. R.]

A *Habeas corpus* went to the Stannary Court, to which an insufficient return was made, and therefore disallowed: *Et per Cur.* The warden of the Stannaries must be amerced, and you may go to the coroners and get it affirmed, and estreat it (you know my Lord Bath's amendment is 5 l.); and an *alias habeas corpus* must go for the insufficiency of the return of the first, and upon that the body and the cause must be removed up: If another excuse be returned, we will grant an attachment.

Alias habeas corpus granted upon insufficient return. Holt 334. S. C.

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Habeas Corpus.

9. Yoxley's Case.

[Pal. 1 Ann. B. R.]

Commitment on
35 El. c. 2. till
delivered by due
course of law, i.e.
Mod. Cases 75.
Carth. 291. S. C.
Comm. 224.
Skim. 369.
Vide note to
Brz.'s case.
Ante 349.

ONE Yoxley was committed by the Earl of Nottingham, till he should be delivered by due course of law, for refusing to be examined, and answer whether *Jesuit or not*, according to the 35th of *Eliz. c. 2.*, which empowers the justices to examine and commit him if he refuse to answer such questions: and the Court held the commitment naught, because the statute was not pursued; and that this was a kind of conviction or judgment to be founded upon the statute. The Court held further, that they had a power to examine; and he being examined, made answer, *No Jesuit*; and was discharged.

10. Keach's Case.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 789. S. C. by the name of *Dowler v. Keach.*]

H. committed
by the Admir-
alty in execu-
tion, not remov-
able into B. R.
to answer an ac-
tion to be
brought there.
Holt 335. S. C.

A *Habeas corpus* issued to remove H. from the prison of the Admiralty, where he lay in execution upon a sentence, to answer an action to be brought against him here. Upon the return it was moved that the defendant might be committed here, for that there was no other way to sue him; for he was not chargeable in the prison of the Admiralty, and there ought not to be a failure of justice. Holt, Chief Justice, said, this was new: That though the proceeding of the Admiralty was by the civil law, yet it was supported by the custom of the realm, and this Court must not elude their process. He inquired as to the action, and thinking it only a pretence, said, There being no action pending here, consequently they ought not to commit him, and the plaintiff could not declare against him till in custody; otherwise if an action had been depending. The defendant was remanded, *ex motu Sal-*
keld.

Vide Str. 936,
641.

11. Hollingshead's Case.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 851. S. C.]

Ante, pl. 3, 9.
Commitment by
commissioners of
bankrupt till he
shall be discharg-

HOLLINGSHEAD was brought up on *habeas corpus*, on which was returned a warrant of commitment by commissioners of bankrupt, for refusing to be examined by them; and the conclusion of the warrant of commit-
ment

Habeas Corpus.

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ment was, — ~~or otherwise discharged by due course of law~~: ed by due course of law, ill.
And this was held naught; for the words of the statute are, He shall be committed till he submit himself to be examined by the commissioners.

12. Anonymous.

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[Hill. 1 Ann. B. R.]

AFTER an interlocutory, and before final judgment in an inferior court, a *habeas corpus cum causa* was brought: Before the return of the writ, the defendant died, and a *procedendo* was awarded; because by the 8 & 9 W. 3. c. 11., the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court, and by this means he would be deprived of the effect of his judgment, which would be unreasonable.

Habeas corpus after interlocutory judgment, and then defendant died. *Procedendo* awarded. Carth. 75. Barnes 221. Str. 527.

13. Fazacharly *versus* Baldo.

[Trin. 3 Ann. B. R.]

ON a *habeas corpus* to the sheriffs of London, they returned an action on a by-law with penalty for not weighing at the city-beam. *Parker* and *Eyre* moved the return might be filed, for otherwise the party could have no remedy if the return was false, and that there was no inconvenience on the other side; for the record might be taken off the file at any time the same term. 1 *Roll. Rep.* 85. At least a *procedendo* might be awarded. 1 *Lev.* 93. 1 *Keb.* 133, 170. *Et per Holt, C. J.*,

6 Mod. 177. *Procedendo* may be awarded after filing the return of *habeas corpus*. Ante 341. 1 Sid. 108. 1 *Keb.* 470. *Holt* 322. 335. S. C.

1st, If a record be filed here, it can never be sent down or remanded, either in the term it is filed, or any other; and that is plain by the act of 6 H. 8. c. 6., which enables this Court to do it in case of felony, which otherwise they could not have done.

2dly, The record itself is never removed by a *habeas corpus*, as it is on a *certiorari*, but remains below; and the return is only an account or history of their proceedings, stated and sent up to the superior court to judge and determine the matter there; therefore if a cause be removed hither by *habeas corpus*, the plaintiff here must begin *de novo*, and declare against the defendant as *in custod. mar.*

Record not removed by *habeas corpus*. Skin. 245.

3dly, The *habeas corpus* suspends the power of the Court below, so that if they proceed, the proceeding would be void & *coram non judice*.

Barnes 384. 2 Bur. 775.

2 Jon. 209.

4thly, That

Habeas Corpus.

4thly, That the return in this case may be filed, because the very record below is not returned, and therefore will not be thereby filed; of consequence a *procedenda* may be granted, because it will not send out any record filed in this court, but takes off the suspension they were under by the *habeas corpus*. Accordingly the writ was filed, and afterwards a *procedenda* awarded.

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14. French's Case.

[Mich. 3 Ann. B. R.]

THE defendant was out on bail in an action in *B. R.*, and was taken on an extent at the queen's suit; the bail brought him upon a *habeas corpus*, and prayed he might be committed to the marshal in discharge of his bail; and notwithstanding great opposition was made by the attorney-general, he was turned over, because the action here was precedent to the queen's extent.

Cro. El. 389.
Dyer 197, 297,
307. Stat.
25 Ed. 3. Ch.
39. 647. S. C.
Habeas corpus
for H. in custo-
dy at the suit of
the Crown. Post.
354. 1 Will.
248. Str. 641, 1217. 4 Bur. 2034. 1 Bur. 339.

And so it was done in the case of Smith, Mich. 5 Anne. And in Denn's case. Mich. 10 Anne, B. R. This note is in the MS. Rep. of Judge Blencowe.

15. Domina Regina *versus* Layton.

[Pasch. 4 Ann. B. R. Keilw. 41. S. C.]

UPON the return of a *habeas corpus* it appeared, that *Layton* was convicted by Sir *Owen Buckingham*, Lord Mayor of *London*, upon view, by virtue of the 15 R. 2. c. 2., for a forcible detainer of the prison of the *Fleet*, and that he was committed until delivered by due course of law, *et quousque* he paid the fine of 100*l.* set upon him. Sir *James Montague* took exceptions, and objected, 1st, That it did not appear that the mayor was a justice: *Sed non adlocatur*; for the 8 H. 6. gives the same power to mayors, &c. 2dly, That the complaint was of a forcible entry and detainer, and here is no forcible entry at all; and a man's house is his castle, which it is lawful for him to defend with force. *Curia advisare vult*. At another day it was farther objected, That the fine was set at another time; but the Court held that might be set after the conviction, as in *Lambard's Eirenarcha*. Farther it was objected, That it should appear by the conviction, that the defendant had not been three years in possession upon the

8 H.

Commitment for
fine upon con-
viction of for-
cible detainer.
Ante 106, 260.
Mod. Cases 95.
Post. 450. Moore
848. Dalt. c. 22.
sec. 12.

Vide 1 Hawk.
ch. 64. sec. 30,
40.

Lamb. 151. Ld.
Raym. 1514.

8 H. 6. 9. But *per Cur.* That comes in by a proviso (a), and he that would have the benefit of it must plead his possession. *Vide* 2 Cro. 199., and statute 31 El. c. 11. Also the three years possession is intended where the estate is continuing, not else. *Vide Moor* 848. The Court also held, that though the conviction was only of forcible detainer upon view, yet it was traversable upon the 8 H. 6. 9., by him that had been three years in quiet possession, as well as upon a finding by inquisition, and that because the party is to be imprisoned. a Hawk. ch. 64. sec. 53 to 57.

(a) Mr. *Hawkins* intimates an opinion, that a conviction on a penal statute ought expressly to shew that the defendant is not within any of its provisos, 2 P. C. ch. 25. s. 113.; but in *K. and Ford, Str.* 555., and *K. and Bryan, Str.* 1101. (cited 1 *Burn. Jus.* 412.), it was decided, according to the opinion here, that what comes in as a defence by way of proviso should be shewn by the defendant, and need not be expressly negatived in the conviction. *Vide* 5 T. R. 83.

16. Crackall *versus* Thompson.

[Mich. 4 Ann. B. R.]

THE defendant, pending an action against him in B. R., was taken upon a warrant in a criminal matter, and committed to the Compter, and afterwards was there charged with an extent for the queen. And he was brought up by *habeas corpus* at the suit of the plaintiff in the action, in order to be declared against, in custody of the marshal; and Mr. Attorney-General opposed it, because the custody of the marshal was precarious, and he would let him escape as he did *French*; and this case differed from that, because, by the late act of parliament, the plaintiff might declare against him *in custodia vicecomitis*; whereas the bail had been without remedy if *French* had not been committed; and as to the defendant's being arrested on criminal process, that was nothing; for though one so arrested cannot be charged at the suit of a subject in any action, without leave of the Court, yet the queen may charge him: And the defendant was remanded. [354]

17. Anonymous.

[Mich. 4 Ann. B. R.]

HABEAS corpus ad respond. was granted to the county palatine of *Chester*, and afterwards superseded upon the motion of Mr. *Chefbire*, who cited two precedents. Habeas corpus lies not to county palatine.

Heir.

1. Smith & Ux. *versus* Angel.

[Trin. 1 Ann. B. R. Intr. Pasch. 13 Will. 3. Rot. 325.
2 Ld. Raym. 783. S. C.]

Far. 40. S. C.
Heir cannot
plead a term for
years raised by
his ancestor in
delay of execu-
tion, but should
confess assets.
2 Mod. 50.
3 Salk. 157,
178, &c.
Plowd. 440.

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DEBT against an heir upon the obligation of his ancestor; the defendant, not denying the action or obligation, pleads, that his ancestor was seised in fee of three fourth parts of such and such tenements, and that in 1697 he demise the same for five hundred years to A., who entered, and that the said reversion descended, & *riens ultra*; and that at the time of the action brought he had no tenements in fee-simple by descent *praterquam* the said reversion; and that afterwards there was a bill in Chancery exhibited against him by the ancestor's wife for dower, and a decree obtained against him for the third part of those three fourths for the wife's life. *Et hoc, &c. unde petit judicium si ipse de debito predicti. praterquam* in the reversion after the lease, and the estate in dower when they respectively happen, *virtute scripti obligatori predicti onerari debeat, &c.* To this there was an idle replication, a rejoinder, and a demurrer.

It was not questioned but judgment ought to be given for the plaintiff; the doubt was, Whether general or special?

2 Rol. Abr. 71. *Et per Cur.* A general judgment ought to be given: And, 1st, Holt, C. J. said, It had been a doubt whether the heir could plead a term for years in delay of present execution; and though there were some precedents to that purpose, yet he was of opinion the heir could not plead a term in delay, but ought to confess assets, for the reversion is assets, and the common law had no regard to a term for years. 2 Inst. 321. 43 E. 3, 9. Br. Assets 9. And there is no mischief in this; for though in consequence a *levari facias* may go, yet the lessee may maintain himself against an ejectment by virtue of his lease. *Vide Dy.* 346. *Herr's Pl.* 307 (a).

(a) The Court of C. B. entertained 2 Will. 49.; but gave judgment on a different point. the same opinion in *Villers v. Handley*,

2dly, As to the decree in Chancery, he held it plain, that there was no estate or interest vested in the wife by that, so that the plea in this respect is naught, and most apparently false : Upon which reason a general judgment was given for the plaintiff.

General judgment for his false plea. Com. Dig. Pleader, 2 E. 5. vol. 5. 3d edit. 593.

2. Denham *versus* Stephenfon.

[Mich. 3 Ann. B. R.]

PLAIN T I F F brought debt on a bond as administrator, against the defendant, as heir of his ancestor ; and upon demurrer one objection was, that he did not shew *coment heres, &c.*, and *Hob. 333.* was cited. *Et per Cur.* Where *H.* sues as heir, he must shew his pedigree, & *coment heres*, for it lies in his proper knowledge ; but where one is sued as heir, he need not ; for the plaintiff is a stranger, and it would be hard to compel him to set forth another's pedigree. For the principal point in this case, *vide title Administrator, pag. 40. pl. 10.*

Vide ante 40. 6 Mod. 241. Where defendant is sued as heir, the declaration need not shew coment heir. Aliter in a suit by him. Holt 45. 3 D. 382. p. 10. S. C. Vide Cro. Car. 151.

Austin *versus* Bennet.

[Pas. 5 W. & M. B. R.]

TR E S P A S S for a cow ; the defendant shewed that *J. S.* was possessed of, &c. and died, and that he seized the cow as heriot-service, and does not shew that he seized it within the manor. *Et per Cur. H.* may seize either for heriot custom or service, any where ; but one cannot distrain for them out of the manor.

Where it may be seized and where distrained. Goul. 97. Show. 31. 2 Leon. 8. Dr. & Stud. 9, 76. 1 Sid. 437. 1 Lev. 295.

1 Mod. 216, 217. Lut. 1367. Fitz. Heriot, 5. 6 Ed. 3. 36. 2.

Highways, Rivers, Bridges.

[*Vide Stat. 13 G. 3. ch. 78.*]

1. Dominus Rex *versus* The Inhabitants of the Parish of Newington.

[Trin. 8 Will. 3. B. R.]

5 Mod. 68. Con-
struction of 2 W.
& M. Stat. 2.
c. 6. sect. 8.
Skin. 643. S. C.
Holt 506.

BY the 2d of *W. & M., stat. 2. ca. 6. sect. 8.* the pavements of streets are to be repaired by the inhabitants of the said streets; and by *sect. 9.* the scavengers are to be paid by the parishioners; and the question was, Whether householders, who are bound to repair the pavements before their own doors at their own costs by the 8th clause, are bound to contribute to the payment of the scavengers' rates? And the Court held they were, for that an indefinite proposition is universal, and they are parishioners: And as for paving before their own doors, they have the principal benefit of it; so that is no reason to excuse them from other parochial duties.

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2. Domina Regina *versus* Kime.

[Pas. 2 Ann. B. R. 2 Ld. Raym. 858. S. C.]

If justices ap-
point H. to
work on the
highways six
days between
such a day and
such a day, it is
void. 13 G. 3.
ch. 78. sect. 37.

INDICTMENT for not working toward the repair of highways according to the statute, shewing that six days *inter* such a time and such a time were appointed by the justices, and defendant did not come upon any of the six days; this indictment was held naught, for the particular days ought to be set forth. The justices must not appoint six days generally between such a time and such a time, but must be particular; and since the appointment was naught in this case, the party was not bound to come at all.

3. Domina Regina *versus* Watts.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 856. S. C. Entries 25.]

Indictment for
suffering a house
on the highway
to be likely to

INDICTMENT for not repairing a house standing upon the highway, ruinous and like to fall down, which the defendant occupied and ought to repair *ratione tenura sua*.

sue. The defendant pleaded not guilty; and the jury found a special verdict, *viz.* That the defendant occupied, but was only tenant at will, and whether he was liable was the question. *Et per Cur.* The *ratione tenura* is only an idle allegation; for it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance. And as the danger is the matter that concerns the public, the public are to look to the occupier, and not to the estate, which is not material in such case as to the public. And *Powell, J.* held, That there might be such a tenure, and that tenures being chargeable upon the land by the statute of avowries, it is not material, even in an avowry, what estate the occupier has in the premises liable.

fall down, lies against tenant at will.

4. Warren *versus* Matthews.

[Hill 2 Ann. B. R.]

ONE claimed *solam piscariam* in the river *Ex*, by a grant from the Crown. *Et per Holt, C. J.* The subject has a right to fish in all navigable rivers, as he has to fish in the sea; and a *quo warranto* ought to be brought to try the title of this grantee, and the validity of his grant (a).

Mod. Cases 73, 105. S. C. Subject has a right to fish in all navigable rivers. Davies 57. Plowd. 315. 7 Co. 2 Salk. 637.

(a) In navigable rivers the fishery is common; it is, *primâ facie*, in the king, and is public. If any one claims it *exclusively*, he must shew a right. If he can shew a right by prescription, he may then exercise that right, though

the presumption is against him unless he can prove such an exclusive right. *Carter v. Mercot*, 4 Bur. 2162. The same was also ruled in *The Mayor, &c. of Oxford v. Richardson*, 4 T. R. 437. *Vide Dawys* 55.

5. Domina Regina *versus* The Duchess of Bucklugh and Al. [358]

[Pas. 3 Ann. B. R.]

AT a trial at bar upon an information for suffering a common bridge to be ruinous, which the defendants by tenure were obliged to repair, it was resolved, 1st, That if a manor be held by the service or tenure of repairing a common bridge or highway, and that manor afterwards comes to be divided into several hands; every one of these alienees, being tenants of any parcel either of the demesnes or services, shall be liable to the whole charge,

Manor held by service of repairing a certain bridge. Tenant of any part is liable to the charge. *Far.* 54, 55, 91, 98. 6 Mod. 150. S. C. 307, 255, 191. 3 Salk 77, 381. *Holt* 128.

charge, and are contributory among themselves. And though the lord of the manor might, upon the several alienations, agree to discharge those that purchased of him, of such repairs; yet that shall not alter the remedy for the public, but only bind the lord and those that claim under him. As the whole manor, and every part of it in the possession of one tenant, was once chargeable with the reparation, so it shall remain, notwithstanding any act of the proprietor: It shall not be in his power to apportion the charge whereby the remedy for public benefit should be made more difficult, or by alienations to persons unable, to render it, in respect of the parts which should come into such hands, quite frustrate. 2dly, That though a manor subject to such charge comes into the hands of the Crown, yet the duty upon it continues, and any person claiming afterwards, under the Crown, the whole manor, or any part of it, shall be liable to an indictment or information for want of due repairs.

And the charge continues, tho' it comes to the Crown.

[359] 6. *Domina Regina versus* Inhabitants of Cluworth.

[Pas. 3 Ann. B. R.]

Where inhabitants submit to a fine, they must also repair the way. 6 Mod. 163. S. C. Holt 239.

THE defendants were indicted for not repairing a common footway, and confessed it, and submitted to a fine. *Et per Cur.* The matter is not at an end by the defendants being fined, but writs of *distringas* shall be awarded *in infinitum*, till we are certified that the way is repaired (a); but the defendants are not bound to put it in better condition than has been time out of mind, but as it has been usually at the best (b).

(a) By stat. 13. G. 3. ch. 78. s. 47., all fines, issues, penalties, or forfeitures for not repairing the highways, shall be paid to such person as the Court imposing the same shall appoint, to be applied towards the repair and amendment of such highways.

(b) *K. and Inhabitants of Cumberland, Hill.* 33. G. 3. The defendants were indicted for not repairing a bridge; and one of the defects complained of was, its being too narrow for the exigencies of the public. Ver-

dict for the Crown, and motion for a new trial, on the ground that the county is not obliged, for public convenience, to make a bridge wider than it has heretofore been. Lord *Kenyon*, and *Grose*, J. intimated an opinion, that a county is bound to widen as occasion may require; and *Buller*, J. *contra*; *absente Aylmer*: But a new trial was unanimously refused, as there appeared other defects sufficient to support the conviction. MS.

7. *Domina Regina versus* Inhabitants Com. Wilts.

[Mich. 3 Ann. B. R.]

INFORMATION against the county for not repairing *Laycock* bridge; they pleaded, that the village of *Laycock* ought to repair it; and it was proved in evidence, that the justices of the sessions had made an order upon the village to repair it; but the Court held that was no evidence, for the justices might indict for the neglect, but could not make an order; and the county is liable, unless they can find a particular person to charge. *Northey*, attorney-general, cited a case, wherein it was adjudged, that if a private person build a bridge, which afterwards becomes a public convenience, the county (a) is bound to repair it.

County liable to repair a bridge, unless they can charge a particular person.
1 Vent. 61.
6 Mod. 150,
191, 255, 307.
Ante 358.
3 Salk. 381.
Holt 339.

1 Hawk. ch. 77.
f. 2.

(a) *R. acc. Rex v. West Riding of Yorkshire*, 5 Bur. 2594. 2 Bl. 685.

8. *Domina Regina versus* Sainthill.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1174. S. C. See the Entries 69.]

INDICTMENT found before justices of peace at the sessions, for not repairing *occidentalem partem communis pontis pedalis continent. dimid. pontis in communi semita*; judgment for the queen, and error brought. It was objected, that the 22 H. 8., by which justices of peace have their jurisdiction of nuisances in bridges, extends only to bridges in the common highway. 2 Inst. 701. *Vide West's Pref.* 119, 156. 2dly, It ought to shew the quantity, viz. so many feet in length, and so many in breadth. It was answered, that there may be *communis strata*, which is not the king's highway, and yet the justices have power over nuisances in that case, not by virtue of the 22 H. 8., but by the 1 E. 3., which gives power of all nuisances. The Court doubted as to the first exception, over-ruled the second, it being said *dimidium*; but held that *pons pedalis* did not signify a foot-bridge, but a bridge a foot long; and so reversed the judgment, being *pedalis* for *pedestris*.

6 Mod. 255. S.C. by the name of *Regina v. Sainthill*. Palm. 389.
2 Keb. 178.
1 Vent. 208.
Ante 12. Holt 129. Rep. B.R. Temp. Hard. 316.

Pons pedalis, quid. 2 Roll. 81.
1 Hawk. c. 76.
f. 1 ibid. c. 76.
f. 89.

House and Building.

Tenant *versus* Goldwin.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1089. S. C.]

Vide Record,
p. 766. Ante
21. S. C. Mod.
Cases 311, 360.
Defendant's privy
separated by
partition walls
from the plain-
tiff's cellar.
Defendant ought
to repair the wall
of common right.
Holt 500.
3 T. R. 768.
Fortesc. 2. 2.
2 Rol. 141.
Hutt. 136. Lut.
92. 2 Ld. Raym.
1568.

6 Mod. 313,
116, 19. 1 Vent.
237, 239, 319.
2 Lev. 148.
2 Vent. 185, &c.
3 Keb. 529.

In what cases
one man may
compel another
to repair his own
house.

IN an *action on the case* the plaintiff declared, that he was possessed of a messuage, and in a cellar, part thereof, was wont to lay coals, beer, &c.: That the cellar joined to the defendant's messuage; and by a wall which the defendant *debit* *reparare* was separated and defended from the defendant's privy, and that for want of repairing this wall, *scditates & sordida surice predict. in cellarium ipsius que fluebant, &c.* There was judgment by default, and damages upon the writ of inquiry: And, upon a motion in arrest of judgment, Holt, C. J. was at first of opinion, that, the defendant being a tertenant, the plaintiff could not put a charge upon him without shewing a special title. Upon this it was afterwards argued, that there have been cases where the plaintiff has, by a *de jure debuit & consuevit*, charged the defendant even where a tertenant. *Sands and Tresufes*, 1 Cro. 575. In the case of a watercourse, 3 Lev. 266. In the case of a way, 1 Lut. 119. And that it is not necessary in any case for the plaintiff to shew a title where the defendant is liable of common right. Thus it is not requisite in an assize for a rent-service, or for common appurtenant to make title even against the tertenant; *aliter* of an assize for a rent-charge or common in gross, unless the assize be against the pignor of the profits. 32 H. 6. 15. a., 35 H. 6. 7. b. So of all charges by act in law, as against a parish for not repairing a highway; otherwise if against a private person: That the flowing of this filth was an actual trespass, like the case 6 E. 4. 7., *Fitz. Tresf.* 110.: And that every man ought to use and keep his own, so as not to damnify his neighbour. That one man might compel another to repair his house, in several cases. Two joint-tenants of a house, one may have a writ *de reparatione facienda* against the other; and the writ supposes *quod ad reparationem & sustentationem domus tenetur: Aliter* of a wood and fence. *Mo.* 374. 11 Co. 82. b. 2 *Inst.* 403. *Reg.* 153. b. *F. N. B.* 127. So if H. has a house near another's, which he will not repair, a writ *de domo reparanda* lies, and supposes *quod reparare debet. Note:* The writ is good without *solet.* *Reg.* 153. b. *F. N. B.* 127. c. d. *Reg.* 153. b. 1 *Inst.* 56. b. One man has the upper

upper part of a house, another the lower. *Kelw.* 98. *b.* Towards the end of the term, the Chief Justice called for the *poslea*, and gave judgment for the plaintiff. He did not approve of the case in *Kelw.* 98. *b.*, and thought the writ in *F. N. B.* 127. *b.* must be founded upon the particular custom of places. The reason he gave for his judgment in the principal case was, because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour; and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's. That the case might indeed possibly be such, that the defendant might not be bound to repair; as if the plaintiff made a new cellar under the defendant's old privy, or in a vacant piece of ground which lay next the old privy before, in such case the plaintiff must defend himself: But that cannot be the case here, for then he could not be bound to repair; and upon the words *debet reparare*, he must be acquitted upon the trial. But, on the other side, if *A.* has two houses, and the house of office on the one is contiguous to the cellar of the other, but defended by a wall, and he sells this house with the house of office, the vendee must repair the wall; so if he keeps this and sells the other, he himself must repair the wall of the house of office; for he whose dirt it is must keep it that it may not trespass. *Sal-keld pro quer. Southouse pro def.*

Nat. Brev. 127.
9 Co. Alered's
case. Poph. 170.
Hutt. 136.
1 Sid. 167.
2 Keb. 825.
Mod. Cases 22,
245, 314.
1 Bullit. 116.
Hob. 131. Cro.
Eliz. 191.

House of Correction.

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Vide St. 7 J. 1.
c. 4. 17 G. 2.
c. 5. 22 G. 3.
c. 64.

The Case of the Hundred of Blackheath.

[Pasch. 1 Ann. B. R.]

TH E R E being a mighty increase of people in the hundred of *Blackheath*, by reason thereof it was thought necessary to erect a new house of correction within that hundred, to restrain and employ idle people and vagabonds: For this end a petition was presented to the justices in their quarter-sessions for such a workhouse; and it was ordered

Justices of peace
may by 19 Eliz.
c. 4. increase the
number of work-
houses, if neces-
sary, but it must
be at the charge
of the whole

county. Vide
ante 359. pl. 7.
Holt 340. S. C.

39 El. c. 4. con-
tinued by 3 Car.
1.

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Justices cannot
delegate author-
ity. Post. 477.
Cald. 30. Burn,
tit. Sessions.

by the Court, that the justices of the precinct, or any two of them, should cause such a house to be built, and should assess a tax on the hundred for carrying on and completing the said work. Upon this a question arose, Whether the justices could cause a house of correction to be erected in a county which had one already? It was objected, that this power of the justices was by the 39 *Eliz. cap. 4.* which statute is expired. But *per Holt, C. J.* The 39 *Eliz.* is confirmed by 3 *Car. 1.*; and all acts continued by 3 *Car. 1.* are likewise continued till it be otherwise ordained, and this stands upon the same foot with the 43 *Eliz.*, which is no otherwise continued; and the justices therefore may increase the number of workhouses for the county, if there be occasion. A second question arose, Whether the justices could raise the tax out of the particular hundred only where the house of correction was to be built? *Broderick* argued they might, because it was for their particular convenience, and would save them a greater charge in removing vagrants to remoter places, and that the hundred in this respect might charge themselves at common law. *Sed per Holt, C. J.* The tax cannot be raised upon any particular precinct or hundred, but must be a general tax upon the whole county, because the house of correction must be for the whole county, and cannot be erected for a particular precinct, unless in boroughs and corporations; and he held that this could not be done by any authority at common law, because it was no charge at common law; Where the common law creates a charge upon any precinct, as to repair bridges, ways, churches, &c., the common law gives them the method of answering that charge; otherwise where no charge is by law laid upon them, as in this case; therefore a majority cannot bind the rest, but all must agree; which *Forwell* and *Gould*, Justices, agreed. 3dly, The whole Court agreed, that sessions could not delegate their authority to particular justices of peace, nor invest them with a judicial power in the matter, but may refer a matter to them to inquire after, and report back.

Jeofails.

1. Brook *versus* Ellis.

[Pas. 5 W. & M. B. R.]

UPON a *devastavit* suggested against both executors, viz. *A.* and *B.*, the writ was to the sheriff to inquire of wasting by both; the sheriff returned a *devastavit* as to *A.*, but said nothing as to *B.* This being assigned for error, after judgment upon a verdict, was held to be aided by the verdict, being but an insufficient return, or a misreturn by reason of the omission; otherwise, if no return at all. *Vide* 3 Cro. 587. 3 Co. 81. *Noy* 72. *Cro. Car.* 295, 312.

Insufficient re-
turn of *devastavit*
aided by verdict.
1 Lev. 142.
1 Mod. 4, &c.
1 Lut. 899.
3 Cro. 219.
1 Jon. 319.
Skin. 571. §. C.

2. Dorne *versus* Cashford.

[Pas. 9 Will. 3. B. R. 1 Ld. Raym. 266. S. C. Comyns 44.
S. C. 2 Sho. 195. S. C.]

THE plaintiff declared, that he was possessed of the Greyhound inn, &c., by lease thereof for a term of years, and that he and all those whose estate he had, *habuerunt & habere debuerunt & consueverunt viam ad ecclesiam, &c.*, and the defendant obstructed it. After a verdict for the plaintiff, the judgment was arrested for this reason, that lessee for years has nobody's estate but his own, and therefore he cannot lay a *que estate*, and the title is impossible; but *habere debuit* without a *que estate* had been well enough. Adjudged 3 Keb. 528. 1 Ven. 13. 1 Sid. 297.

Termor for years
cannot declare on
a *que estate*.
Carth. 432.
1 Saund. 112.
2 Salk. 562.
3 Salk. 14.
2 Keb. 87, 96.
1 Mod. 231.
2 Mod. 318,
243. 1 Lev. 190.
3 Lev. 19.
Raym. 389.
Nelson's Lutw.
Ab. tit. 2. E&.

3. Clerk *versus* Martin.

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[Pas. 1 Ann. B. R. *Vide* this Case title Bills of Exchange,
pag. 129., pla. 12.

ET *nota* the diversity there taken, that after verdict it may be intended that no damages were given for matter insensible; but it cannot be so intended for matter sensible, but insufficient in law.

4. Courtney *versus* Strong.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1217. S. C.]

Assumpsit after verdict, judgment arrested, because nudum pactum. Ante 129, 6 Mod. 265. S. C. differently reported; but the report in Lord Raym. accords with this.

IN *assumpsit*, the plaintiff *James Courtney* declared, that in consideration that he had agreed with the defendant at his request, that the defendant *quiete occuparet quoddam mesuag. & vigint. acras terre onerat. cum redditu 20 l. nuper concessum cuidam Johanni Courtney liber. & immun. ab omni molestatione prefat. Jacobi Courtney ratione reddit. predict.* the defendant promised. *Non assumpsit* was pleaded, and a verdict for the plaintiff. But judgment was arrested on the motion of Mr. *Eyre*, for that the rent-charge was granted to *John Courtney*, and not to the plaintiff; and there was no room to imagine an assignment, or that the rent did not continue in *John*. So then the defendant was to pay the plaintiff for not doing that which he had no right to do, which is *nudum pactum*, and no consideration. It was urged by Mr. *Squibb* for the plaintiff, that, being after verdict, the Court must intend a consideration, and that there was an assignment. *Curia contra*: Here was a promise, though not a legal promise, and such as could bind; and if that promise which is laid was fully proved, the jury might well find the verdict; *Et per Powell*, They could not but find it.

2 Bur. 924.
Doug. 658.

5. Crouther *versus* Oldfeild.

[Hill. 4 Ann. B. R. 2 Ld. Raym. 1225. S. C.]

Mcd. 19, 19.
Ante 170. Copyhold estate laid without saying, ad voluntat. domini, and held well after verdict, because the lands alleged to be parcel of the manor.

THE plaintiff declared, *quod cum seiscitus fuisset de uno messuagio & decem acris terra in N. parcell. manerii de W. ac tent. per copiam rotuler. Cur. manerii illius ut tenens custumarius in feodo simplici secund. consuetudinem manerii; cumque ipse prefat. quer. habeat & habere debeat, ipseque & omnes tenentes custumarii manerii predict. per consuetud. infra maner. ill. a tempore cuius, &c. Habuer. & habere debuerunt & consueverunt communiam pastura in quodam loco vocat. Wainles Moor parcell. dicti manerii pro omnibus averiis communicalibus super tenementa sua custumaria levan. & cuban. tanquam ad tenementa sua predict. spectan. & pertinen. predict. tamen defendens to deprive him of his said common, had inclosed, per qued, &c. Upon not guilty pleaded, the plaintiff had a verdict; but upon motion in the Common Pleas, judgment was arrested. Upon this the plaintiff brought a writ of error in B. R., and that judgment was reversed. 1st, It was agreed in this case, that a man cannot be a copyholder, nor an estate be a copyhold estate, though*

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though it be held *per copiam rotulorum & secundum consuetudinem manerii*, unless it be also *ad voluntatem domini*; and the Chief Justice said, the great difference between copyholds and customary freeholds, which pass by surrender, is (a), that the copyholder is in by demise from the lord, but in the case of customary freeholds the lord is only an instrument: and that in pleading a title to a copyhold estate, it is sufficient to shew a grant from the lord; but in the other case it is not enough to shew that the lord granted it, or that A. surrendered to the lord, and he granted; but it must be shewn that the surrenderor was seized in fee, and surrendered to the lord, and he granted, &c. 2dly, It was agreed, that if this estate must be taken to be freehold, the judgment of the Common Pleas was rightly given: For then the plaintiff being seized of a freehold estate, to make a title to the common, should have prescribed, that he and all those whose estate he had, have time out of mind had, &c., and cannot make a title by custom, according to 1 Cro. 418. (b) And here the Court admitted the case of *Dorne and Cashford*, *supra* pla. 2., and said, that though the plaintiff in possessory actions may declare upon his possession without setting out a title; yet if he undertakes to set out a title, and shews a bad one, the verdict cannot cure that. *Vide* 1 Cro. 418. 2 Cro. 315. 2 Saund. 136, 186. 1 Mod. 294. But the Court held, that now after verdict this estate of the plaintiff must be taken to be a copyhold estate, and not a freehold estate, because it is both laid and found that the tenements were parcel of the manor, and that by custom the plaintiff, *ut tenens customarij*, has common; all which is utterly impossible, unless the tenement was copyhold, and therefore must be supposed such, though the words *ad voluntatem domini* were omitted, comparing it to the case of debt for rent by an assignee of a reversion, who shews no attornment, and has a verdict; and the case in 1 Sid. 218. Upon this foot the whole Court held, that though a title, which could not be good, could never be aided by a verdict; yet a title in a declaration which was only imperfectly set forth, and where the want of somewhat omitted might be supplied by intendment, was cured by verdict (c):

And

(a) *Vide* 5 Bur. 2764.

(b) *R. acc. Grimstead v. Marlowe*, 4 T. R. 717.

(c) This rule is confirmed by all the authorities relative to the subject, of which the following may contribute to its illustration. *Gilb. C. B.* 121, 139.—The gift of the action must be substantially alleged, but any other cir-

cumstances relative to that action shall be supposed by the verdict. Whatever is essential to the gist of the action, and cannot be cured by verdict, are such substantial facts as must be laid in proper time and place, so that the defendant may traverse them distinctly, if he pleases; but such parts of a declaration as cannot make a sub-

In pleading copyhold, it is sufficient to shew the grant of the lord; in customary freeholds the estate of the surrenderor must be shewn. *Vide* 2 Lill. 644. 1 Lut. 899. 5 Co. 35. Hob. 113, 119. 2 Saund. 328.

Verdict will not aid a bad title when shewn, though it need not have been shewn. *Cro. Jac.* 185. pl. 5, 499. pl. 3, 480.

Verdict aids a title defectively set forth, not a bad one. *Cro. Car.* 205, 312, 313, 497. 1 Jon. 319. Ante 130.

And hereupon, supposing this to be a copyhold estate, there arose these objections: 1st, That the custom was not alleged

stantive issue shall be intended after verdict, because they are matter of form only.

Hutchins v. Stevens, Raym. 487. 2 Sbo. 234. The bargainee of a reversion brought debt for rent, without alleging attornment, and obtained a verdict; and, upon motion in arrest of judgment, it was held, that the declaration was cured; as, without proving it at the trial, the plaintiff could not have had a verdict. *Stedman v. Hay*, Comyns 366. The party prescribed for a pew, but did not allege an *usage to repair* it; this was aided by the verdict, and the Court presumed that a good prescription was proved; *Bell v. Simpson*, 2 Wils. 10. In debt on an award, omitting to state the arbitration bond was helped by verdict; *Frederick v. Lockup, qui tam in error*, 4 Bur. 2018. The original plaintiff sued, as well for himself as the parish of A., upon a penal statute, giving one moiety of the forfeiture to the informer, and the other to the poor of the parish where the offence was committed, *but did not allege the offence to have been committed in A.*, the omission was cured, as it must have been proved at the trial that the offence was committed in A., the jury having found that the defendant did owe to the poor of that parish; *Weston v. Mason and Chapman*, 3 Bur. 1725. In an action on bond, with condition for a person appointed bailiff of a hundred duly to *execute the office within the hundred*, and execute all warrants, and make return thereof; breach was assigned, that the bailiff had not returned a particular warrant, and the defendants rejoined, that he had; on verdict for the plaintiff, the Court held that the replication, not averring the warrant to be directed to him as bailiff of the hundred, was, if faulty, made good by the verdict; *Avery v. Hoote*, Cowp. 825. Declaration that the defendant *used a gun, being an engine for the destruction of game*, was held, after ver-

dict, to import, that the gun [being an engine] was used for the destruction, &c. It was said by Lord Mansfield, that a verdict will not mend the matter where the gift of the action is not laid in the declaration, but it will cure ambiguity, and the use must have been proved at the trial, otherwise the verdict could not have been found for the plaintiff. *Sheatfield and others, assignees, v. Halliday*, 3 T. R. 779. The plaintiffs declared as *assignees of A. and B., and also as assignees of C.*, and, after verdict for them, the Court held, that if they could intend that the plaintiffs stood in such a relation to the bankrupts as would support the action, they were bound so to do; that there might be a joint commission against them all, separate commissions against each; or if it must be taken that there was one commission against A. and B., and another against C., the former might have been in a joint debt of the two, and the latter in a separate debt of the third. (It was agreed that two such commissions could not be maintained on a joint debt of the three.)

Stotesbury v. Smith, 2 Bur. 924. Declaration on a promise to pay money to an officer to accept bail is not aided; the Court held, that there was no pretence for presuming the consideration to be lawful after verdict, as it was stated upon the face of the declaration, and *manifestly appeared to be illegal*. *Rushton v. Aspinall*, Doug. 679. It was ruled, that the want of alleging a demand from the acceptor of a bill of exchange on the day it becomes due, and notice of non-payment, is not helped by verdict in an action against the indorser. Lord Mansfield said, The rule is, where the plaintiff has stated his title or ground of action defectively or inaccurately, because to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial, it is a fair presumption that they were proved; but

alleged expressly, *quod infra manerium prædict. talis habetur & a tempore, &c.*, but *quod cum ipse per consuetudinem habere debeat*, which does not affirm a custom, but suppose it. *Vide 4 Co. 31. b. Vaugh. 251, 253. 2 Cro. 185. Co. Ent. 123. b. Raft. 627.* 2dly, That they ought not to claim common *tanquam ad tenementa sua spectant. & pertinent.*, for it is annexed to the estate, and not to the land; the reason is, because the estate grew by custom, and so did the common as part thereof, or rather a privilege annexed thereto. *Vide 2 Cro. 253. 2 Brownl. Entr. 96.* If a copyholder purchase the freehold of his copyhold, his common is gone. As to the first objection, the Court held, that it was but a defective title, and there was room enough to induce a proof of the custom; and it was only an informality of laying the custom, which is cured by the

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but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption. *Spiers v. Parker, 1 T. R. 141.* The statute 19 Geo. 2. ch. 30. gives an action for pressing mariners in merchants' service in the *West Indies*, unless they have deserted from some ship of war: A declaration founded on this statute must aver, that the mariner has not deserted from any ship of war, and the omission thereof is fatal after verdict. *Buller, J. said, "As to its being intended after verdict, nothing is to be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. That is the case where a feoffment is pleaded without livery; the livery is always implied, because it makes a necessary part of the feoffment. I know of no decision against this rule."—Bishop v. Hayward, 4 T. R. 470.* The declaration stated, that a promissory note was indorsed by the plaintiff to the defendant, who re-indorsed it to the plaintiff; judgment was arrested, though the Court admitted that a case might possibly happen in which the plaintiff might have stated that he was substantially entitled to recover on the note.

Good v. Elliott, 3 T. R. 693. In an action on a wager, whether a woman had bought a waggon, *Buller, J. held,* that judgment ought to be arrested,

because it might have been pertinent to the issue to give evidence that she stole it, and wagers are illegal which affect the characters of third persons. But the other Judges were of a contrary opinion, as nothing of that kind appeared on the record; and the wager was not illegal because, by some possible supposition which ingenuity might devise, it might affect the interest of a third person.

Vide Palmer v. Starvelly, ante 24. Gould v. Johnson, ante 25. Roe v. Haugh, ante 29. Nelsbop v. Anderfon, ante 114. East v. Effington, ante 130. Harmon v. Owden, ante 140. Butterfield v. Burroughs, ante 211. Buxendin v. Sharp, Jenkins v. Turner, post. 662. Rann v. Hughes, 7 Bro. P. C. 550. Rex v. Bishop of Landaff, Str. 1006. Wickerv. Norris, Rep. B. R. Temp. Hard. 116. Burn et ux v. Mattaire, id. 119. Palgrave v. Windham, Str. 212. Castle v. Bailly, Comyns 528. Tomlin v. Burlace, 1 Wilf. 6. Fouthers v. Bryan, 1 Wilf. 180. Allan v. Hundred of Kirtou, 2 Bl. 842. Warner v. Green, Com. 114. May v. King, Com. 116. Benson v. Lisle, Com. 576. Sutton v. Johnson, 1 T. R. 508. Anon. 1 Ld. Raym. 452; 2 Ld. Raym. 1060. Padey v. Stacey, 5 Bur. 2698. Marriott v. Lister, 2 Wilf. 141. Bidgood v. Way, 2 Bl. 1236. Copleston v. Piper, 1 Ld. Raym. 191. Small v. Cole, 2 Bur. 1159. 1 Vent. 119, 34, 123. Com. Dig. Pleader, c. 87. Bul. N. P. 320.

verdict.

Diversity between common belonging to the estate, and to the land. 2 Lev. 67.

verdict. As to the second objection, the Chief Justice took this difference, viz. Where a copyholder claims common in the wastes of a manor, it properly and strictly belongs to the estate, and if he enfranchise his copyhold, in that case his common is lost; but where he claims it out of the manor, it belongs to the land, and not to the estate; and if he enfranchise the estate, the common continues: But all the precedents of common are *tanquam ad tenementa sua spectant*. 9 Co. 113. Co. Ent. 9. Dy. 363. b. 1 Saund. 349. 2 Saund. 321. Co. Ent. 574. *Wincb Ent.* 931, 1026, 1027, 1111. *Hern* 81. *Brownl. Red.* 428, 430. And the Chief Justice thought, that, since the pleadings were so, the common might be said to belong to the copyhold tenement, since it belonged to the copyhold estate; for that which belongs to the estate belongs to the tenement: And the judgment was reversed after great deliberation. *Vide 1 Lut.* 126. The report of the judgment of the Common Pleas.

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Impar lance.

1. Anonymous.

[Mich. 10 Will. 3. B. R.]

Special impar lance.

7 Mod. 62.

IN an action brought against *H.*, he pleaded to the jurisdiction of the Court, and the declaration being not delivered four days before the end of the term, pleaded it as he might by the course of the court within the first four days in the subsequent term; and the clerk, to avoid the trouble of making up a post-roll, entered it with a special impar lance as of the subsequent term, which spoiled the plea; and the clerks were ordered to make up post-rolls, and not to use these special impar lances, which *Holt*, C. J. said, were crept in of late, and were not known formerly.

2. Anonymous.

[Hill. 11 Will. 3. B. R.]

Impar lance upon an information, when granted, and for how long. *Fulk.* 371. pl. 10.

PER *Holt*, C. J. In an information, if the defendant comes in upon the first process, he has an impar lance of course; but if upon the attachment, he must plead *insanter*.

3. *Domina Regina versus Rawlins.*

[Mich. 3 Ann. B. R.]

RAWLINS, being bound by recognizance to appear and answer an information, appeared at the day, and prayed an imparlance. *Et per Northey*, attorney-general, An imparlance is not to be denied; but for how long shall he be allowed to imparl? *Et per Cur.* An imparlance is a reasonable time to advise, and there have been imparlances from one return-day to another; but now they are always from one term to another in the crown-office. Yet, *per Holt*, C. J. it seems reasonable that the defendant should have the same time on such an appearance, as if he had stood out and come in upon an attachment or *capias*, *i. e.* the same time that the length of the process would take up, and no more; for when he had come in upon that, he must have pleaded *instante*. 6 Mod. 243.
S. C. 3 Salk.
185.
Post. 378.

Incident, Appendant, and Appurtenant. [368]

Poole's Case.[Mich. 2 Ann. *Coram Holt*, C. J. *At nisi prius in Middlesex.*]

TENANT for years made an under-lease of a house in *Holborn* to *J. S.*, who was by trade a soap-boiler. *J. S.*, for the convenience of his trade, put up fats, coppers, tables, partitions, and paved the back-side, &c. And now upon a *feri facias* against *J. S.*, which issued on a judgment in debt, the sheriff took up all these things, and left the house stripped, and in a ruinous condition; so that the first lessee was liable to make it good, and thereupon brought a special action on the case against the sheriff, and those that bought the goods, for the damage done to the house. *Et per Holt*, C. J. it was held,

1st, That during the term the soap-boiler might well remove the fats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special

Things set up by lessee for years, for the convenience of trade are removable during the term, and seizable on a *feri fac.* S. C. 3 D. 315. p. 2. *Holt* 65.

Co. Litt. 53. a. 1 Roll. Rep. 216. *Swinb.* 132, 345, 346. *Moor* 177, 178.

special custom) in favour of trade and to encourage industry: But after the term they become a gift in law to him in reversion, and are not removeable.

4. Co. Herlaken-
den's Case.
Owen 70, 71.

2dly, That there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete the house, as hearths and chimney-pieces, which he held not removeable.

3dly, That the sheriff might take them in execution, as well as the under-lessee might remove them, and so this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might: And the reason is, because in that case the tenant hath only a bare power without an interest; but here the under-lessee hath an interest as well as a power, as tenant for years hath in standing corn, in which case the sheriff can cut down and sell (a).

(a) Of late years many things are allowed to be removed by tenants which would not have been permitted formerly; as marble chimnies, &c.; so more strongly in things relative to trade, as brewing vessels, coppers, fire engines, cyder-mills, &c. The general rule of law is, that whatever is fixed to the freehold becomes part

of it, and cannot be moved; but many exceptions have been admitted of late to the general rule as between landlord and tenant, or between tenant for life or in tail and the reversioner. But the rule still holds as between heir and executor; *Ball. N. P.*

34. *Vide 1 Ark. 477. 3 Ark. 13, 16, 4. idellwes v. Murch 3 East.*

[369] Indictments, Informations, Inquisitions, Convictions, &c.

1. Rex & Regina *versus* Pullen & al.

[Pas. 3 W. & M. B. R.]

Oath made de
veritate præmis-
forum: sufficient
in convictions.
3 D. 305. p. 6.
S. C. Comb.
213.

SIR William Williams took exceptions to a conviction on 13 Car. 2. c. 10., wherein the memorandum was, *quod super 23 Septembris, Hall venit coram A., B., C., tribus justiciariis pacis, & informavit*, that the defendant, with greyhounds, chased in, &c., and that *tunc Hall and Marshall made oath de veritate præmiss., & super prædict. sacrament.* Pullen was convicted, *ideo consideratum est quod forisfaciet 20l.*, one moiety to the informer, the other to my Lord

Lord *Thanes*, the proprietor of the park, *secundum formam statuti*. It was agreed, that the whole need not be recited in the conviction: but if it be, and appear ill, it may vitiate the conviction. 2dly, They held, that saying they made oath *de veritate premissi*, generally (a), without setting it forth specially, was well enough. 3dly, That the judgment for distribution was good enough, though the statute gives it after execution. 4thly, The 13 *Car. 2. c. 10.* is to be intended of clandestine hunting, &c., not where the party does it only to assert a right; but the Court could not take information of that by affidavits or otherwise, because it appeared not on the conviction. 5thly, That the time of the conviction, and also of the offence, must appear: the reason of which seems to be, because it must be on a prosecution within six months after the offence committed. Afterwards, viz. *Hill. 3 W. & M., Shower* prayed an attachment upon the affirmance, but was denied it: Yet the Court was of opinion, that they ought to execute their judgment of affirmance, as well in this case as of orders of sessions affirmed; but they thought the proper execution would be a *levari*, or *fieri facias* specially made out on the statute of 13 *Car. 2. c. 10.* *Nota, Pas. 4 W. & M. B. R., Rex & Reg. versus Rogers*, the Court held they might award a *fieri facias* of the goods, and in default thereof a *copias ad satisfaciendum* against the person of the deer-stealer, as well as the justices; and a *fieri facias* was awarded in this latter case.

Palm. 44. 4 Co. 48. a. Execution may go on affirmance of convictions by *levari, fieri fac.* or *copias ad satisfaciendum*. Post. 374. 378, 379. pl. 24.

(a) It is now fully settled, that upon a conviction the evidence ought to be set out, that the Court may judge whether the justices have done right. *Per Cur. in K. v. Killest, Bur. 2063.* So ruled, *K. and Read, Doug. 485.*

2. Rex & Regina versus Franklin.

[Mich. 3 W. (b) & M. B. R. 2 Ld. Raym. 1038. S. C.]

MR. *Eyre* moved to quash an indictment for exercising the trade of a goldsmith, not having served seven years apprenticeship, for this exception, viz. that it was found at a quarter-sessions for a borough; whereas, by the statute 31 *El. c. 5.*, it ought to be at the quarter-sessions of the county. But the Court held, the indictment might be at the sessions of a borough (c), (though it had been otherwise ruled heretofore in several other cases.) *Note*; The words of the statute are,—*shall be inquired of, heard and determined in the assizes or general quarter-sessions of the peace of the same county where such offence shall be committed,*

Quashed because presentant. exhibit for presentar. 6 Mod. 200. S. C. 3 Salk. 351.

Indictment upon 5 Eliz. may be found at a borough-sessions. Cro. Jac. 19, 20. Cro. El. 635. Cro. El. 108. pl. 3.

(b) *Mm.* This appears, by the report in *Ld. Raym.*, to have been decided 2 Ann. (c) *R. acc. 1 Bur. 252.*

4 Rep. 41, 42.
Puff. pl. 7.
2 Hawk. ch. 25.
sec. 127., and
notes to 8th ed.
Vide Cowp. 230.
Doug. 194.

or in the leet within which it shall happen, and not in anywise out of the same county where such offence shall happen to be committed. But for a third fault, viz. *presentant. existit* for *presentatum*, it was quashed.

3. Rex & Regina *versus* Clerk.

[Trin. 5 W. & M. B. R.]

Indictment for preaching, not being licensed, quashed, because not said *contra formam statuti*.
2 Lill. 46. Allen 50. 4 Co. 48. a.
1 Saund. 250.

2 Hawk. c. 25. sect. 116, 117.
G. 6. 3d edit. vol. 4. p. 378.

INDICTMENT that twenty persons being assembled, the defendant, not being licensed, preached to them, not concluding *contra formam statuti*, was quashed, for they might be the defendant's own family, to which the statute does not extend, and it is not an offence at common law. But *Dolben* differed in this.

Doug. 445. Cowp. 30. Burn, Ind. f. 9. Com. Dig. Ind.

4. Rex & Regina *versus* Ball.

[Trin. 5 W. & M. B. R.]

Recognizance for trying, when forfeited.

2 Haw. ch. 27.
f. 58. Str. 946.

UPON removal of an indictment, the defendant enters into a recognizance to try it; yet this is not forfeited unless the prosecutor gives rules; and so if one gives a recognizance to prosecute a writ of error with effect, the defendant must give rules, and nonsuit the plaintiff, or there is no forfeiture.

5. Rex & Regina *versus* Harwood.

[Trin. 5 W. & M. B. R.]

Indictment for words spoke to prejudice a public market, quashed. Vide 2 Hawk. ch. 25. f. 146., and notes to 6th ed., also Com. Dig. Ind. H.

INDICTMENT for words spoke, to the intent to prejudice the market of *Barnstable*, and hinder the town of toll, viz. *I have got a judgment against the town, that we shall not pay for standing; and they are fools that pay*: The Court quashed it, and said, The recorder of the town ought to be fined for it.

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6. Rex & Regina *versus* Whitehead.

[Trin. 5 W. & M. B. R.]

Quashed, because the charge laid by recital. Cro. Jac. 19, 20.

MR. *Northey* moved to quash two indictments, which were *quod cum* an order was made that the parishioners should receive a bastard-child; they in contempt did refuse

refuse to receive it. And because it was not positively said, that it was ordered that they should receive it, but only by recital with a *quod cum*, they were quashed.

5 Mod. 137, &c.
Cro. Car. 464.
&c. 3 Mod. 53.
1 Burrow 400.

Ld. Raym. 1363. 2 Hawk. ch. 25. f. 60.

7. Rex & Regina *versus* Trobridge.

[Mich. 6 W. & M. B. R.]

INDICTMENT was *per jurator. presentat. existit*, that the defendant erected a cottage; & *ulterius presentant quod continuavit contra formam statuti*, and there was judgment for the king; but reversed on a writ of error; for there is nothing to agree with *presentant*, and it is a new indictment distinct from the first, the matter whereof is no offence at common law, and the *contra formam* necessarily refers to the *ulterius presentant*, and no more.

4 Mod. 345.
S. C. *Præsentat. existit. &c.* Et *ulterius presentant*, reversed for that. Far. 152.
Ante, pl. 2.
Comb. 307.
Skin. 564. Holt 344.

8. Dominus Rex *versus* Stocker.

[Mich. 7 Will. 3. B. R.]

INDICTMENT for making, or causing to be made, a false bill of lading, in the disjunctive: And though forging, or causing to be forged, is forgery, yet the Court thought the indictment not good in the disjunctive (a).

Ante 343. S. C.
5 Mod. 137.
Charge in the disjunctive, ill.
Mod. Cases, &c.
329. Rep. B. R.

Temp. Hard. 370. Str. 900. Barnard. B. R. 347. 2 Sess. Caf. 25. Com. Dig. Ind. G. 3.
2 Hawk. c. 25. f. 60.

(a) This is not a fatal defect in an *order*, 1 Bur. 399. *Rex v. Middleburgh*.

9. Dominus Rex *versus* Walcot,

[Mich. 7 Will. 3. B. R.]

IF a man is indicted and tried in B. R., the indictment is entered upon the plea-roll; but if he be tried at the sessions of the *Old Bailey*, the indictment when brought here is put into a bag and laid by. *Per Holt, C. J.*

Indictment when entered on the plea-roll.
Holt 345. S. C.

10. Dominus Rex *versus* Hill.

[Mich. 7 Will. 3. B. R.]

IF a man be outlawed by process in an information, and comes in and reverses the outlawry, he must plead *insanter* to the information.

Ante 367. Outlawry on information. 2 Lill.
35. 5 Mod. 141.
S. C.

11. *Dominus Rex versus The Inhabitants of Belton.*

[Hill. 8 Will. 3. B. R.]

Indictment for any heinous offence not quashed on motion.

1 Vent. 370.

2 Lill. 47. Holt 345. S. C.

For cases where the Court will or will not quash indictments, see

Com. Dig. Ind.

H. 3d edit. vol.

4. p. 400.

2 Bur. 1127.

Andr. 210.

2 Hawk. c. 25.

sect. 146.

1 T. R. 316. Str. 623, 1088, 1268. 1 Bur. 516, 543.

INDICTMENT on stat. *Westm.* 2. c. 4., for pulling down hedges. The defendant moved to quash it, which *Holt*, Chief Justice, refused, saying, He might as well move to quash a declaration without pleading to it. Afterwards, *Trin.* 11., on a like motion, the Chief Justice said, We never quash indictments for forgery, perjury, subornation, or any crime concerning the highways. In *Trin.* 10 *W.* 3. B. R., on a like motion, the Court said, they would not quash an indictment for enticing away another's servant upon motion, but must plead, demur, or move in arrest of judgment. So of all crimes that are heinous. So it was held, *Pas. 4 Ann., Dom. Regina versus Wigg*, in an indictment for a nuisance.

12. *Dominus Rex versus Gregory.*

[Hill. 8 Will. 3. B. R.]

Information filed by attorney-general not quashed. 2 Lill. 59.

A Motion was made to quash an information filed by the attorney-general, and the Court would not upon motion.

13. *Dominus Rex versus Gaul.*

[Hill. 10 Will. 3. B. R. Int. inter Pla. Coronæ, Trin. 7 Will. 3. Rot. 39. 1 Ld. Raym. 370. S. C. 5 Mod. 425.]

Carth. 465. Information or popular action on penal stat. made before 9 Jac. 1. c. 4. cannot be brought in B. R. unless for facts done in the county where the Court sits. Styl. 340. 2 Mod. 246. 3 Lev. 71. 2 Keb. 401. Post. pl. 14. 3 Salk. 199. S. C. Clift Ent. 394. Holt 563.

AN information on the 5 & 6 E. 6. c. 14., for buying and selling live cattle, not having kept them the time the statute appoints, was exhibited in this court. The buying and selling was alleged to be in *Norfolk*; and it was insisted, that the information ought to have been brought in *Norfolk*, where the fact was done, and not in *Middlesex*; and that the statute of 21 Jac. 1. was made for the ease of the subject. On the other side it was objected, that the *King's Bench* is not restrained, and that the attorney-general may exhibit informations in this court for the king, notwithstanding the statute; and they cited *Latch.* 192. 1 *Sid.* 360. 2 *Keb.* 340. 1 *Vent.* B. *Jones* 193. 3 *Keb.* 247. 2 *Gro.* 178. 3 *Inf.* 176, 191. 1 *Gro.* 112.

And now *Holt*, C. J. said, Ten judges had agreed in the following resolutions:

Vide 3 T. R.
364. Str. 1081.
2 Hawk. c. 26.
sect. 34, 35.

1st, That the 21 *Jac. c. 4.* does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby; but that statute is as to them, as it were, repealed *pro tanto*.

2dly, That all informations and popular actions on penal statutes made before that act, must by force of 21 *Jac. 1. c. 4.* be laid, brought, and prosecuted in the proper county where the fact was done.

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14. Hicks's Case.

[Hill. 10 Will. 3. B. R.]

HOLT, C. J. reported the opinion of all the judges in this case. An action of debt was brought in the King's Bench on 5 *Eliz. c. 4.*, by a common informer, for exercising a trade, not having served as an apprentice; and the question was, If the jurisdiction of the King's Bench was taken away by 21 *Jac. 1.*? for it was thought fit to settle it, because of the case of *Barnes and Hughes*, 1 *Vent.* 8.

1 Vent. 354.
Sid. 400.
Lit. Rep. 163.
1 Lev. 249.
2 Keb. 401, 424,
447, 458.
4 Mod. 158.
S. C. Cases B. R.
31. 2 Lev. 204.

And it was resolved, by the opinion of eleven of the judges, 1st, That 21 *Jac. 1.* restrains the jurisdiction of the King's Bench in actions of debt by common informers, and that they cannot bring debt upon the statute in the King's Bench, unless the cause of action arise in the county where the King's Bench sits, but must in other cases prosecute by information, &c. before justices of assize, &c., as the statute directs (a).

Debt in B. R.
lies not on any
penal statute
made before
21 Jac. 1. Ante,
pl. 13. Vide
3 T. R. 364.

2dly, It was resolved, That where a remedy is given by action of debt, &c., in any court of record, &c., by any later statute subsequent to 21 *Jac. 1.*, does not extend to such actions, but stands repealed as to them (b).

Secus of penal
acts made since.
Cro. El. 645,
739. Cro. Car.
112. 2 Hawk.
c. 26. f. 34, 35.

But the Chief Justice declared, that his own private opinion was, that, where any subsequent act gives any popular action, it must be laid in the proper county within the equity of 21 *Jac. 1.*

(a) It was decided, *Cartbew* 290., that the statute 21 *Jac. 1.* did not give inferior courts any jurisdiction which they did not possess before; and in *Shipman v. Henbest*, 4 T. R. 109. the meaning of the act was held to be, that where the superior and inferior courts had a concurrent jurisdiction, both as to the subject matter and as to the

mode of proceeding, the jurisdiction of the former is taken away.

(b) A temporary act, made before 21 *J. 1.*, which expired before that period, but was afterwards continued as from the time when it expired, and by a statute subsequent to that continuance made perpetual, was ruled to be a statute of the time when it was first enacted, *Shipman v. Henbest*, S. C.

Indictments, Informations, &c.

Hale, C. J. was always against the opinion of *Barnes* and *Hughes*; and the principal objection in that case was, that the party offending might get out of the county, and so escape the punishment of the law, as being out of their jurisdiction: But by *Holt*, C. J. This objection does not hold, for there may be process of outlawry sued out against him; the statute of 21 *Jac.* 1. giving the same process that lay in actions of trespass *vi & armis* at common law; and therefore neither debt nor information, though exhibited by the attorney-general, lieth here, but in *Yorkshire*, which is the proper county in this case (a).

(a) *R. acc. Str.* 415. *Vide Comp.* 369.

[374] 15. *Dominus Rex versus* The Mayor and Aldermen of Hertford.

[*Hill.* 10 Will. 3. B. R. 1 *Ld. Raym.* 426. S. C.]

Information quo warranto they admit persons to be freemen not inhabitants.

1 *Sid.* 86. *Holt* 326. S. C. *Carth.* 503. *Post.* 376. Ante 5.

A Motion was made to file an information in nature of a *quo warranto* against the mayor and aldermen of *Hertford*, to shew by what authority they admitted persons to be freemen of the corporation who did not inhabit in the borough. The motion was pretended to be on behalf of the freemen, who by this means were encroached upon; and an information was granted, because it was a question of right, and there was no other way to try it, nor to redress the parties concerned.

Different judgments on a writ of *quo warranto*, and information. *Com. Dig. Quo War. c. 5.* 6th vol. 3d edit. pa. 107.

In a *quo warranto* the judgment is to seize the franchise *in manibus regis*; in an information, as here, to oust the defendant of the particular franchise; and herein the first process is a *subpœna*, and then a *distringas*, wherein there must be fifteen days between the *teste* and return, if it issue into a foreign county (b).

(b) See 1 *Bur.* 402. 3 *Bur.* 1816.

16. *The Case of* The Surgeons' Company.

[*Trin.* 11 Will. 3. B. R.]

Information for false return of mandamus. *Cro. Car.* 252.

A *Mandamus* was granted to the Company of Surgeons to choose officers; they made a return under their common seal: And now a rule was moved for, and granted, to file an information against some particular persons of the Company for that return: And the Chief Justice said, The Court must proceed by way of information; for being a matter concerning public government, no particular person

tion is so concerned in interest as to maintain an action; and the information must be granted against particular persons, though the return be under their common seal, for there is no other way to try the right; and if it be found for the king, there must be a peremptory *mandamus*; perhaps we shall set but a small fine.

17. Dominus Rex *versus* Dummer.

[Mich. 11 Will. 3. B. R.]

A Motion was made for an information against *Dummer*, for perjury committed in a trial between the *King* and *Fitch*, in answering to this question, Whether he had received (a) 800 *l.* for passing his accounts? *Et per Holt, C. J.* If the question had been fair, we would have granted an information; but this question was in effect, Whether he was guilty of bribery? which it could not be expected he would own. You may indict him, but we will not grant an information (b).

Information for perjury denied. Here the question was unfair. 2 Salk. 514. Mod. Cases 168. 2 Show. 12. Far. 101. 5 Mod. 343. Cumb. 450. Holt 364. S. C.

(a) Query if this word ought not to be paid?

(b) The following note is taken from the 6th edit. 2 *Hawk.* ch. 26. sect. 8. n. (2).

“ The Court will not grant an information against a private person for reading a pretended proclamation, 1 *Black. Rep.* 2. Nor against a husband for endeavouring to retake his wife after articles of separation, 1 *Bl. Rep.* 18. Nor against persons who assemble with a lawful design, notwithstanding some unlawful and irregular acts ensue, 1 *Bl. Rep.* 48. Nor against justices acting improperly in their public capacity, unless proof of flagrant corruption appears, *Str.* 1181. *Bur.* 785, 1162. *Bl.* 432. *Doug.* 589. Nor against ministers for converting brief-money, *Str.* 1130. *Bl.* 443. Nor for bribing electors, *Bl.* 541. Nor for a perjured intrusion to a living, upon an affidavit that it was simoniacal, *Str.* 70. *Bernard.* 11. Nor for a libel if it appear to be true, *Str.* 498. *Doug.* 284. 387. 3 *Bac. Abr.* 475. Nor for offences committed upon the high seas, *Str.* 918. 2 *Keb.* 190. Nor against a dissenter for refusing the office of sheriff, *Str.* 1193. 1 *Wils.* 18. Nor for words of a justice in his public

character, *Str.* 1157. Nor for attempting subornation, *B. R. H.* 24. Nor for sending a challenge, if the informant had previously imparted a challenge, *Bur.* 316, 402. Nor in favour of one cheat against another cheat, *Bur.* 548. Nor for a general charge of extortion, *Str.* 999. Nor for striking a magistrate in the execution of his office, if the magistrate struck first, *B. R. H.* 240. Nor for an offence against a private statute, *Bur.* 385. Nor if a civil suit is depending upon the same subject, *B. R. H.* 241. And, in general, the discretion of the Court in granting information is guided by the merits of the person applying; by the time of the application; by the nature of the case; and by the consequences which may possibly result from the granting it. *Per Ld. Mansfield, Bl.* 542. *Vide also Com. Inform. B. C.*

“ The Court will grant an information for reproaching the office of magistracy, or defaming the character of magistrates, *Cartb.* 14, 15. For taking away a young woman from her guardian, although Chancery has committed the offender for contempt, *Str.* 1107. *Andr.* 310. Or from her putative father, *Str.* 1162. For not examining

mining evidence upon oath under a reference and rule of Court, 1 *Wils.* 7. (1) Or for demanding a shilling, by a justice, to discharge his warrant, and committing the party for not paying it, 1 *Wils.* 17. For seducing a man to marry a pauper, in order to exonerate the parish, 1 *Wils.* 41. For seducing a woman habituated to liquor to make her will, 2 *Bar.* 1099. For voluntarily absenting by a justice from sessions [when they could not be held without him], *Str.* 21. For refusing to put an act in execution, *Str.* 413. For bribing persons to vote at corporation elections, *Ld. Raym.* 1377. For publishing an obscene book, *Str.* 788. For blasphemy, *Str.* 834. For unduly discharging a debtor by judges of an inferior court, *Hardw.* 135. For refusing by the captain to let the coroner come on board a man of war (to take an inquisition), *Andr.* 231. *Str.* 1097.

For keeping great quantities of gunpowder, *Str.* 1167. For a justice making an order of removal, and not summoning the party, *And.* 238, 273. For impressing a captain as a common seaman, maliciously, 1 *Bl.* 19. For speaking treasonable words, although the offender has been previously punished in an academical way by the vice-chancellor, 1 *Bl.* 37. For contriving the escape of French prisoners, 1 *Bl.* 286. For giving a ludicrous account of a marriage between an actress and a married man, 1 *Bl.* 294. For contriving pretended conversations with a ghost, with an intention to accuse another of having murdered the body of the disturbed spirit, 1 *Bl.* 392, 401. For procuring a female apprentice to be assigned, though with her own consent, to another, for the purposes of prostitution, 1 *Bl.* 439.—[For other cases, see 3 *Bac. Abr.* 166.]

(1) This point is erroneously stated. The information was against an attorney, being a commissioner for taking affidavits, for examining a person on oath upon an arbitration, without putting the deposition into writing.

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18. Dominus Rex *versus* Knight.

[*Hill.* 11 Will. 3. B. R. 1 *Ld. Raym.* 527. S. C.]

Indictment for indorsing exchequer bills, as if they were received for customs. Judgment arrested. 3 *Salk.* 286. S. C.

INFORMATION setting forth, *quod cum* 5 Junii, anno 9 W. 3. tres aut plures commissionar. of the exchequer caused exchequer bills to be issued *ad recept. scacc. secundum formam statuti in eo casu edit. & provis. prædict.* Knight existens nuper receptor generalis, &c., to the intent to get great gains to himself, did fraudulently and falsely indorse twenty bills at the custom-house, *quasi receptæ essent pro customis, & eodem die, &c.* paid them into the exchequer *ac si essent* truly indorsed, *in deceptionem & defraudationem dicti domini regis.* Upon not guilty pleaded, the defendant was convicted; and now a motion was made in arrest of judgment. This case depended on the statute 8 & 9 W. 3. cap. 19. sect. 63., and was twice spoke to, and determined upon good consideration. At last judgment was arrested, and the Chief Justice, in delivering the opinion of the Court, held these points:

No forgery, where no person can be prejudiced but the person doing it,

1st, That nuper receptor does not import that he was the king's officer at the time of indorsing and paying these bills, but rather the contrary, and he must be taken to be a private person, and as such to make this indorsement, which

which in a private person could be no crime, because the falsity might hurt himself, but could not prejudice the king. And it is like the case in *Noy 99.*, where the obligee lessened the sum in the obligation; it would have been forgery in a stranger or in the obligee to make it more; but in regard the obligee had hurt no body but himself, it was no forgery: So it is of this false indorsement, it is not criminal, because it hurts no body but himself. But it is objected, It may be a damage to contractors. I answer, We are to take notice there might be contractors, but not that there are any, because it is not set out.

2dly, The word *indorse* is not sufficient; the words of the act are, *that the person who pays the same into, &c., shall put his name to the said bill, and write the day of the month, &c.* And the information should have been, that the defendant set such a person's name on the back of the bill, *ubi re vera* there was no such person, or *ubi re vera* no such person ordered him to put his name to the bill; for *indorsavit* imports a writing on the back of a thing, but not putting his name upon it, as *petit auditum indorsamenti*. But it was urged by the king's counsel, that this might be plainly understood by the words *quasi receptæ essent pro custumis*. I answer, This is by argument only; and argumentative informations are naught for that very cause; for all charges ought certainly to be set out in pleading. But farther it was urged, that it is said *falso * indorsavit in deceptionem domini regis*, and so found by the jury; and though a fact that appears innocent cannot be made a crime by adverbs of aggravation, as *falso, fraudulenter, &c.*, yet where a fact stands indifferent, as writing, which may be true or false, and is charged to be *falso*, and the jury find it so, all are then estopped to say the contrary. That on the other side it was said, *in deceptionem* is only matter of conclusion. But here is no charge; it is not enough to say the king is cheated; he must appear to be so, as well as said to be so.

3dly, The saying *indorsavit, quasi receptæ essent pro custumis, &c.*, is not well. In an indictment of forgery it is not well to say, the defendant forged a false deed, purporting *quasi* a conveyance, &c., but it must be *continens. (a)*, &c. So here it should have been, that the defendant made a false indorsement, *continens, &c.* Here is a falsity, but nothing is charged that is criminal; for that falsity could

Far. 151. Vide
1 Hawk. c. 70.
f. 4. Leach
335. Str. 1144.
Com. Dig. title
Forgery, 3d ed.
vol. 4. pa. 238.

4 Co. 42. b.
Ante 371. pl. 8.
Charge must be
express, not ar-
gumentative.
Cro. Jac. 19, 20.
5 Mod. 137,
138. 6 Mod.
289. 2 Hawk.
c. 25. f. 60, 119.

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(a) *R. 2 Bl. Rep. 790.* That in forgery of a will it is not necessary to charge the prisoner with forging the last will, &c. To charge it

as a paper writing, purporting to be the last will, &c. is sufficient. *Vide Doug. 300.*

not hurt, nor tend to hurt any body but himself: And the judgment was arrested.

N. B. The issue was tried at bar, and the evidence that the bills were signed at the treasury by three acting commissioners of the treasury; the defendant called upon them to produce their commission, but *Holt*, C. J. held it not necessary, comparing it to the case on the statute of *bue and cry*; where shewing an affidavit is enough, without going into the proof of the justices' power to administer an oath.

19. Dominus Rex *versus* The Mayor and Aldermen of Hertford.

[Pas. 12 Will. 3. B. R.]

No process can issue on informations before recognisance given by informer. 2 Lill. 67. Ante 5, 374. S. C. Holt 320. Carth. 503. 2 Hawk. c. 26. §. 7.

IN the information *supra* pl. 15., against the mayor and aldermen of *Hertford*, a motion was made to set aside the process, because no recognisance was given according to the late act; and this being to try a right, the question was, Whether it was within the said statute, *viz. trespasses, batteries, and other misdemeanors*, which are frivolous wrangling matters of an inferior nature? But the Court said, that this usurpation here pretended was a misdemeanor, and the information might be as vexatious in this case, as in trespass or battery: That this last is a remedial law to prevent vexation, and must be construed accordingly; therefore the process was ordered to be set aside, but the information stood (a).

(a) *R. occ. Rep. B. R. Temp. Hard. 248. Str. 1042.*

20. Dominus Rex *versus* Brown.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 592. S. C.]

Bills before finding; indictmentum a. afterwards.

THE caption of an indictment was *presentat. existit quod sepeialia indictamenta huic schedule annexa sunt bills vera*. To this, exception was taken by *Showers*; 1st, That if there be twenty indictments, one half true, the other false, it is within this finding; *sed Curia contra: Sepeialia indictamenta* imports all the several indictments. Second objection, That they were not indictments till they were found; till then they were only bills; and they were quashed for this cause.

21. Domina Regina *versus* Clerk.

[Pas. 1 Ann. B. R.]

A Coroner's inquisition finding that one Clerk, *cum cultro & jugulum suum voluntarie & felonice & ut felo de se secuit & seipsum murdravit* (a), being removed into this court, was quashed, for that, 1st, The wound ought to be set forth, and it ought to be alleged that it was mortal, and that the party died of it; for it is for that very end and reason that the jury have the view: He might cut his throat, and yet not die of it. And as to the answer, that it shall be intended, because it is said *felonice & ut felo de se*, it was held, that inquisitions must not be taken by intendment any more than indictments, because the party is to forfeit his goods and chattels by this finding; and though the cut was but a *maibem*, it might be said to be done *felonice*. *Vide Dy. 68.* 2dly, The Court held, that such an inquisition would be good without the word *murdravit*, and so is Dame Hale's case; and that if an indictment wants the word *murdravit*, it ought not to be quashed for that omission, for it is still a good indictment for manslaughter, though not for murder: It crept in at first to exclude the offender from having clergy, and it continues accordingly.

This inquisition being thus quashed, though the body had lain buried seven months, the coroner took it up again and had another inquisition found, which was complained of as irregular, and moved to be set aside. *Broderick contra*: The first being insufficient, is as none at all: It was done so in *Barkley's* case, 2 *Sid.* 101.; and in *Bonning's* case, 1 *W. & M.* And the not taking it would be an injury to the king or the lord of the manor.

Holt, C. J. The coroner need not go *ex officio* to take the inquest, but ought to be sent for, and that when the body is fresh; * and to bury the body before, or without sending for the coroner, is a misdemeanor. The body may be dug up again, but it ought to be upon fresh pursuit, not at such a distance of time; for it is a nuisance, and may infect people. In *Barkley's* case, there was the leave of the Court for that purpose. At last it was agreed to † traverse this inquisition, and to try it at the assizes.

(a) Query if it ought not to be *occidit*, instead of *murdravit*?

Far. 16. Holt 167. S. C. Coroner's inquisition quashed, because the wound not set forth, nor that the person died of it.
1 Vent. 181.
1 Mod. 82.
2 Lev. 140, 143.
Ante 61, 190.
3 Keb. 604.
Dyer 304. Andrews 235.
12 Mod. 112.
1 Hawk. ch. 27. f. 13.

Case, ante, 10. Coroner may cause the body to be dug up soon after the burial, but not at a great distance of time.

* Far. 10.
2 Hawk. c. 9. f. 23. Str. 22, 167. 7 Mod. 10, 16.

† Far. 16.
2 Lev. 141, 152.
1 Vent. 239, 278.

22. Domina Regina *versus* Smith.

[Mich. 1 Ann. B. R.]

MR. *Broderick* took exceptions to a conviction of deer-stealing, where the fact was laid to be done *in foresta nra* for keeping deer, and that the defendant killed
H h 4 a deer

Far. 77. S. C. Conviction of deer-stealing.

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a deer without consent of the keeper; and insisted, that *usitat.* might be meant of a long time before, and there might be the consent of the ranger; *sed non allocatur*; for the leave of the ranger is the leave of the keeper, and *usud* speaks the present time as well as time past.

23. King *versus* Chandler.

[Mich. 1 Ann. B. R. 1 Ld. Raym. 581. S. C.]

Carth. 501, 508.
4 Mod. 446.
Summary con-
victions must be
construed strict-
ly. Holt 214.
S. C. Cases B. R.
314. 3 D. 305
p. 6.

Not laid contra
pacem. 4 Co. 41,
42.

That between
such a day and
such a day he
killed three deer,
is well. Brown.
Form. pl. 50,
250, 251, 252,
260. Vide Ent.
186. 2 Lev. 72.

Post. 383. Con-
siderat. est quod
convictus est, is

A Conviction of deer-stealing on 3 & 4 W. & M. c. 10, was returned on a *certiorari*, and exceptions taken to it. And it was said by Holt, C. J. that in these summary proceedings the right of an *Englishman* of being tried *per pares suos* was taken away; therefore the Court was to construe them strictly, so far as to see that the fact was an offence within the act, and that the justices proceeded accordingly (a). And these points were agreed; 1st, That the fact in the conviction need not be laid *contra pacem*, for mere form or formality is not required in these nor any other summary proceedings. *Et per Northey*, attorney-general, This is not the king's prosecution; he can have no fine; but the prosecution of the party, and this is the memorandum of what the justice had done in that matter.

2dly, That *inter* such a day and such a day he killed three deer, is good; for if a day certain were alleged, the informer is not tied up to that: Now in these cases he is confined to give evidence of a killing within these days, so that it is more certain and better for the defendant; and Northey cited *Rast.* 410. *Hern.* 549. *Winch.* 54, 547. *Tho.* 91, 92. *Vid.* 186. *Co. Ent.* 158. &c. Otherwise it is in informations at common law, because every distinct offence creates a new penalty, but in trespass a fact may be laid to be done *diversis diebus & vicibus inter* such a day and such a day; because it is not a new action, but an increase of damages, *per Gould, quod Holt, C. J. concessit* (b).

3dly, That an unlawful killing is sufficient, and it need not set forth a hunting, nor how the deer was killed.

4thly, That *ideo consideratum est quod convictus est*, without *et quod forisfaciet*, is sufficient (c); for the statute gives that

(a) *Vide 2 T. R.* pa. 18. *Boscawen* on Convictions, pa. 10. In the latter it is observed, that as to those parts of the record which are necessary to shew the jurisdiction of the magistrate, and give him cognizance of the complaint, the Courts are more strict in their rule of construction, and expect more pre-

cision in the statement, than as to the steps which follow when that essential point has been ascertained.

(b) *R. acc.* 10 *Mod.* 248.

(c) *R. cont. Str.* 2, 858. In the report of this part of the case in *Ld. Raymond*, the objection is said to be, that the judgment was *quod forisfaciet*; where-

that in consequence, and the judicial part ends at the conviction; the rest is only consequence and execution.

5thly, That if the owner of the park die before execution, and the conviction is affirmed here, his executors shall have a *levari facias* [sed videtur, it must be upon affidavit, and then the matter suggested on the roll]. So may the churchwardens without suggestion or *scire facias*, and so may the king (a).

sufficient without forisfaciet. Executor of the owner may sue execution. Ante 369, 379.

as it ought to have been *ideo considerationem est quod*, &c. In *Carth.* it is said to be, that there was no conditional judgment for setting on the pillory, *fi*,

&c. Vide *2 Bur.* 1163. *Boyl. on Conv.* 117. (a) A particular form of a conviction for deer-stealing is prescribed by stat. 16 G. 3. c. 30.

24. King *versus* Speed.

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[Mich. 1 Ann B. R. 1 Ld. Raym. 583. S. C.]

ON a conviction affirmed in *B. R.*, a *levari fac.* was awarded to the sheriff to levy the penalty: The sheriff seized the goods and sold them. And this coming before the Court, they held,

Carth. 502. S.C. On conviction affirmed in *B. R.* execution shall be by *levari facias* to the sheriff. Ante 369. Cases *B. R.* 328.

1st, That this Court must award execution; for the record here cannot be removed or sent back to the justices; and as the Court have a power to affirm the conviction, the Court in necessary consequence have power to award execution.

2dly, This execution cannot be awarded to the constable, as it would, if the record had been before the justices; but it must be awarded to the sheriff, for he is the officer of the Court, and the Court can take notice of no other.

3dly, It may be by *levari facias*, empowering the sheriff to sell the goods. The words of the act are, That the offender shall forfeit 40 *l.* to be levied by way of distress; and in such case the distress shall not be deemed to be a distress taken as a pledge, but a distress to sell; for the public being concerned, it shall be construed the most effectual levy by distress. Thus upon a *disfringas* in a court-leet for a fine, as in case of nuisance, where the public is concerned, the officer may sell of common right: But upon a *disfringas* in a court-leet *pro certo leta*, the officer cannot sell the distress of common right, without a custom: So for a distress in a court-baron, he cannot sell without custom; but in case of the sewers, the officer has a power to sell the goods. Vide *Al.* 92. 1 *Keb.* 733. 2 *Jones* 25. 2 *Inst.* 738.

Where the law gives a distress for the public benefit, the officer may sell.

25. *Domina Regina versus Jones.*

[Trin. 2 Annæ, B. R. 2 Ld. Raym. 1013. S. C.]

Cheat, where
indictable. Far.
40. Mod. Cases
42, 61, 105,
314, 301, 311.

MR. *Parker* moved to quash an indictment, which was, that the defendant came to *A.*, pretending *B.* sent him, to receive 20*l.*, and received it, whereas *B.* did not send him. *Et per Cur.* It is not indictable unless he came with false tokens; we are not to indict one man for making a fool of another: Let him bring his action (*a*).

3 Salk. 268.

Contra, pag.

522. Cart. 377.

Vide Com. Dig.

Indictment H.

3d edit, vol. 4.

pa. 400.

2 Bur. 1125.

In *Bainham's* case, there was an indictment, for that *A.* borrowed 5 *l.* of the defendant, and pawned gold rings to secure the payment; and that at the day *A.* tendered the money, but the defendant refused to deliver up the rings; and it was quashed (*b*).

Nehuff's Case, ante 151. Str. 866.

(*a*) See stat. 30 G. 3. c. 4. concerning persons who, knowingly and designedly, by false pretences, obtain from any person money, goods, wares, or merchandize, with intent to cheat and defraud any person or persons of the same.

(*b*) *Per Curiam, Rex v. Wheatly*, 2 Bur. 1125. The true distinction that ought to be attended to in all cases of this kind, and which will solve them all, is this: That in such impositions

or deceits, where common prudence may guard persons against the suffering from them, the offence is not indictable; but the party is left to his civil remedy for the redress of the injury which has been done him. But where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot, by any ordinary care or prudence, be guarded against, there it is an offence indictable.

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26. Anonymous.

[Mich. 2 Ann. B. R.]

No motion to
quash an indictment removed by
certiorari after
the recognizance
for trying forfeited. 6 Mod.
245. S. C.
2 Salk. 642.
Rep. A. Q. 33.

3 Hawk. c. 25.
sect. 126.

INDICTMENT was removed by *certiorari*, and, upon the awarding the *certiorari*, a recognizance taken; and now *Salkeld* moved to quash the indictment; but it appearing that the recognizance was forfeited, the Court would not hear the motion. *Holt, C. J.*, said, The practice was or ought to be now altered by the late act; before that, the defendant came soon enough at any time to move to quash, but should not be allowed to do it now, after his recognizance forfeited by not carrying the record down to the next assizes to be tried; and for the same reason the Court refused to let him take any exceptions, either to the *certiorari* or return.

27. *Domina Regina versus Daniel.*

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1116. S. C. cited.]

INDICTMENT, for that at such a day and place the defendant *quendam Carolum Scot, servum suæ apprenticeship cuiusdam Josephi Bishop, extra domum shopam & servitium prædicti. Josephi magistri sui discedere & seipsum abscondere illicitè allexit procuravit & causavit; & quod adtunc & diversis diebus antea illicitè seduxit eundem Carolum ad Carolina hats, valoris, &c. de bonis & catallis præfat. Josephi extra domum & shopam ipsius Josephi illicitè capiend. & asportand. & ill. adtunc & ibidem injustè cepit recepit & habuit sciens bona, &c., & præd. Carolum esse servum præfat. Jos.* The defendant being found guilty, it was moved in arrest of judgment, that this was but a private injury, for which case lies, and not in its nature public to maintain an indictment (a). Trespass will lie for taking away his servant out of his actual service; but for enticing, case lies only, and not trespass. 21 H. 6. 31. Also no fact is laid to be done in pursuance of this enticing; and, as to the latter part about the enticing to carry away the goods, there is no venue laid where the goods were taken away: And judgment was arrested. And in the case of the *Queen and Collingwood, Mich. 3 Ann.*, in this court, which was an indictment of the same nature, the judgment was also arrested for the same reasons.

Indictment lies not for enticing away an apprentice from his master. Mod. Cases 101, 182, 289. Pop. 132, 135. 2 Roll. Abr. 75. Noy 105. 3 Salk. 191. S. C. 6 Mod. 99, 182, 289. Hawk 346. 3 Bur. 1698. Com. Dig. Ind. E. 3d edit. vol. 4 p. 388.

Mod. Cases 288.

(a) *R. acc. Cowp. 54.*

28. *Domina Regina versus Wyat.*

[2. Ann. B. R. 2 Ld. Raym. 1189. S. C. Fortescue 127. S. C.]

INDICTMENT setting forth, that one *Nagb* was convicted of deer-stealing upon 3 & 4 W. & M. cap. 10., before a justice of peace, and that the defendant being a constable, the justice * directed his warrant to him to levy the penalty, and that he had levied the penalty, and had not returned his warrant, nor made any return or certificate at all. The defendant was found guilty, and the indictment removed hither by *certiorari*. *Et per Cur.* resolved,

Ante 175. Constable indictable for neglecting duty required by common law or statute. Rep. A. Q. 53. S. C. * [381]

1st, Though the constable is not named in the statute, nor appointed to be the officer to execute these warrants, yet the justices may command him to execute them; for as at common law the constables were subordinate officers

Constable is the proper officer to the justices of peace. 2 Salk. 501. 2 Hawk. ch. 10. f. 35.

Fortescue 127.
2 Bur. 864.
Skin. 370.
2 Sho. 75.

to the conservators of the peace, so are they now the proper officers of the justices: The constable of the hundred may arrest for breach of the peace as well as a petit constable, 3 Cro. 378., and was an officer at common law, notwithstanding the opinions to the contrary; and the statute of *Winton* only enlarges his authority. *Vide Hale's Pleas of the Crown.* 3 Keb. 231.

2dly, Where an officer neglects a duty incumbent on him, either by common law or statute, he is for his default indictable (a). *Et nota*; In this case, the indictment was not laid *contra formam statuti*, nor need it have been, though the constable had been named in the statute; because the constable is an officer of common law, and when a statute requires him to do what without requiring had been his duty and he must have done, it is not imposing a new duty, and he is indictable at common law for it.

3dly, They held, he need not return the warrant itself, for that is not required; it may be necessary to keep it for his own defence; but he must either return that, or certify what he has done upon it; for without this the prosecutor cannot attain the end of his prosecution, and the defendant cannot be discharged; and in a writ of execution, where something more is to be done upon it, an attachment lies against the sheriff if he does not return the writ. Lastly, They held, that *contra pacem* was superfluous, and could neither do good nor harm, because it was a nonfeasance (b).

(a) *R.* In the case of the *King* against *Bembridge*, *M.* 241b G. 3. that where a person holding a public office under the king's letters patent, or derivatively from such authority, is amen-

able to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it.

(b) See *Sira.* 233. *Bur.* 1729.

29. Domina Regina *versus* Gould.

[Pas. 3 Ann. B. R.]

6 Mod. 163. S.C.
Ser. and Rem.
133. Indictment
for refusing to
provide for an
apprentice. Ante
66, 68. 2 Salk.
491.

INDICTMENT, for that a poor boy being put out apprentice to the defendant pursuant to the statute, he *vi & armis* refused to provide for him. *Et per Cur.* Since we allow the justices power to put out apprentices, we must allow an indictment for disobedience, either in case of not receiving, turning off, or not providing for such apprentice, as the law requires; and the *vi & armis* is superfluous (c).

(c) The statute of *Eliz.* not annexing any penalty to a refusal, the only punishment was necessarily by indict-

ment; and the statute 8 and 9 *Will.*, which gives a specific penalty, and a summary remedy, being merely affirmative,

ative, would not annul the former Note to *Stephens v. Watson*, ante 45. mode of prosecution. *Vide* 2 *Bur.* 799. *Tamen quare* & *vide Str.* 1268. *Cowp.* 524, 650. 2 *Hawk.* c. 25. l. 4.

30. *Domina Regina versus Culliford.*

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[*Mich.* 3 *Ann.* B. R.]

P E R Cur. If there be two indictments against *H.* for the same thing, as if one be found by a coroner's inquest, and another by the grand jury, and *H.* is acquitted upon one, yet he must still be tried upon the other, to which he may plead the former acquittal; but the usage of the *Old Baily* is, and indeed so is the fairest course, to try him on both indictments at once.

Where two indictments are for the same fact, proper to try on both at once. 3 *Salk.* 39. S. C. 6 *Mod.* 219.

31. *Domina Regina versus Pierfon.*

[*Trin.* 4 *Ann.* B. R. 2 *Ld. Raym.* 1197. S. C.]

INDICTMENT found at *Hicks's Hall*, for that the defendant *fuit communis lena ac male dispositas personas in domibus lupanaribus convenire & scortationes & fornicationes committere pro suo lucro proprio illicite procuravit.* Upon not guilty pleaded, the defendant was convicted, and judgment against her; and now a writ of error was brought, and the judgment reversed. The Court agreed, 1st, That if a lodger, who has only a single room, will therewith accommodate lewd people to perpetrate acts of uncleanness, she may be indicted for keeping a bawdy-house, as well as if she had the whole house. 2dly, That one may be indicted for keeping a bawdy-house; but a bare solicitation of chastity is not indictable; just as it is actionable to say, a woman keeps a bawdy-house; but not to say, she is a whore (*a*).

Indictment lies for keeping a bawdy-house, but not for being a communis lena, &c. 6 *Mod.* 178, 289, 311. 1 *Sid.* 282. 1 *Farell.* 52. 1 *Lev.* 299. 1 *Keb.* 635. 6 *Mod.* 256. *Post.* pl. 35.

(*a*) *R. acc. Str.* 1100. 10 *Mod.* 384. *Vide Sayer* 33. 1 *Hawk.* ch. 74.

32. *Domina Regina versus Atkinson & al.*

[*Passch.* 5 *Ann.* B. R. 2 *Ld. Raym.* 1288. S. C. 3 *Ld. Raym.* Entries 89.]

INDICTMENT was against *A.* and others, for that being receivers of the queen's tax, they did *colore officii sui* extort money from several persons. Upon a motion in arrest of judgment, it was held, that two men may be indicted jointly for a battery or extortion, because it is a crime

Two may be jointly indicted for extortion; otherwise for exercising a trade not being a crime.

titie. 2 Rol. Abr.
31, 116. 3 Keb.
739, 764.

crime at common law, of which they might be jointly or severally guilty. But as to the case in 2 Ro. 81. 1 Ven. 302., they admitted *that, viz.* That two men could not be indicted jointly for exercising a trade, not having been apprentices; for not being apprentices is that which occasions the crime and forfeiture, and that must of necessity be several. Judgment for the queen (a).

(a) Vide 2 Bur. 983. Str. 870, 921. 2 Sess. Ca. 24. 3 T.R. 98. 2 Hawk. ch. 25. s. 89.

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33. Domina Regina *versus* Jennings.

[Trin. 7 Ann. B. R.]

On 3 & 4 W. &
M. c. 10. Seller
of deer's skin
may be convict-
ed. Rep. A. Q.
225, 227. S. C.

SIR James Mountague moved to quash a conviction of deer-stealing on 3 & 4 W. & M., taken by a justice who entered into a glover's house, and, finding a deer-skin, asked him how he came by it; the glover said he bought it of J. S., who not giving a good account of himself, was convicted. And the Court held, that the justice might enter and convict the person that sold it; for the statute might be easily evaded, if the deer-stealer could discharge himself by a sale (a).

(b) The 5th section of stat. 16 G. 3. provisions respecting that offence) expressly includes this case, and requires the skin to be traced from hand to hand to the first possessor.

34. Domina Regina *versus* Barret.

[Mich. 9 Ann. B. R.]

If information
be in due time,
conviction may
be at any time
afterwards.

A Conviction of deer-stealing being returned on a *certiorari*, the objection was, 1st, That the conviction appeared to be a year after the day of the information; but it was held sufficient that the information be prosecuted within a year after the fact; for that is a good commencement of the suit, and it is from that the computation is made in all such cases. 2d Objection. It is said to be *in quodam loco in ambulacro chasee*, and this walk may be in a chase and not of it; *sed non allocatur*, for it must be intended that the walk was part of the chase, and the place part of the walk. 3d Objection. No due summons; *non allocatur*, the defendant having appeared. In a *mandamus* it must appear that the party was summoned, because he is to lose his freehold, and it is a course of proceeding by common law, wherein no appeal lies; otherwise in convictions, which are a proceeding by the statute, in which the

Appearance aids
want of sum-
mons in sum-
mary convic-
tions. Post. 418,
435. Str. 261.
3 Bur. 2785
Bast. on Conv.
58.

the defendant appeared, and that appearance will aid the want of summons: So it was held in *Peache's* case, and all the precedents are so.

4th Objection, *Quod convictus est et forisfaciet summam 20 l. juxta formam statuti*, without making a distribution, which ought to be 10 l. to the party grieved, 10 l. to the poor, &c. But the Court held it was well enough. It is enough to say, *quod convict. est et forisfaciet juxta formam statuti*; for by the statute he is only to forfeit in case he has goods, which is conditional, and not absolute; and by *Parker, C. J.* the words *juxta, &c.*, qualify it. *Et per Cur.* The judgment in such cases seldom makes a distribution; and it has been a question, Whether *convict. est* be not enough of itself (a). *Vide Rex versus Candler, ante pl. 23. (b)*

5th Objection: This conviction is pardoned by the late act of general pardon, being not a final judgment. *Vide Dy. 322.* To which it was answered by Serjeant *Pengelly*, 1st, That this is more than an interlocutory judgment, and that it is a complete * and a final judgment, because a writ of error lies on it. 2dly, He argued, that it could not be pardoned: 1st, Because it is a forfeiture to the party grieved, and he hath an interest in the penalty, and it is part of the judgment. 2dly, Because the punishment of the party in this case is by way of satisfaction, not for example, like the three years imprisonment by the statute *de malefactoribus in parvis*. 2 *Inst.* 200. 3 *Inst.* 171. 5 *Co.* 51., not like 1 *Cro.* 46, 47, 198. 11 *Co.* 65, 66. 3 *Cro.* 338. 1 *Mod.* 34. 3 *Cro.* 82, 83. *Adjournatur.*

(a) *R. contr. Str.* 858.

(b) Where the distribution is discretionary, there must be a particular adjudication, *Rex v. Dempsey*, 2 *T. R.*

96. *Vide also Rex v. Hall, Cowp.* 60.

Rex v. Vipont, 2 *Bur.* 1163. *Boycaw.* 117.

Ante 378. Forisfaciet juxta formam statuti. sufficient. N. B. Mich. 4 Geo. in Exchequer-chamber this exception was over-ruled in error in an information upon a seizure where the statute gives half to the informer and the other for the king. Whether conviction of deer-stealing pardoned by act of general pardon? *Cro. Jac.* 335. *Cro. Car.* 68. 2 *Bull.* 182. *Cro. Jac.* 159. *Cro. Car.* 9, 47, 199. 3 *Inst.* 238. *Noy* 91.

* [384]

35. Domina Regina versus Williams.

[Mich. 10 Ann. B. R.]

INDICTMENT against husband and wife for keeping *commun. domum lenocinii, Anglice*, a common bawdy-house. Upon a motion to quash it, the objection was, that the keeping a house could not be the keeping of the wife, any more than it is the keeping of the servant. But to this it was answered and resolved by the Court, that the wife may be guilty and commit a crime with her husband; and that that crime is joint and several. Husband and wife may commit a trespass, murder, treason. In *Dr. Hussy's* case, baron and feme were indicted of a ravishment

Indictment against baron and feme for keeping a bawdy-house. *Cases* L. E. 63. S. G.

1 *Sid.* 410. Ante. pl. 381. 2 *Roll. Abi.* 79.

K. 83. Q. 2 Rol.
Rep. 37. 3 Keb.
34. Hob. 95.
1 Hawk. c. 1.
f. 12. St. 1120.

ment of *Ward*, and the wife was found guilty. *Hob. 95.* Keeping a bawdy-house is a common nuisance, and the indictment for keeping is a charge against them for this nuisance. The keeping is not to be understood of having or renting in point of property; for in that sense the wife cannot keep it, but the *keeping* here is the governing and managing a house in such a disorderly manner as to be a nuisance, and the wife may have a share in the management or government of a disorderly house as well as the husband. 2 Ro. 345. 3 Keb. 34. 1 Keb. 575. cited.

36. Domina Regina versus Ingram & Ux.

[Hill. 10 Ann. B. R.]

Battery implies
an assault.
1 Hawk. c. 62.
f. 1.

2 Keb. 51.
2 Salk. 593.
2 Show. 93, 149.

If an offence suf-
ficient to main-
tain the indict-
ment be well
laid, it is enough,
though other
facts ill laid.
Poph. 208.
5 Co. 121.
2 Hawk. c. 25.
f. 74, 87. Vide
Doug. 750.

* [385]

INDICTMENT against the husband and wife for an assault and battery; setting forth, that they *vi et armis insultum fecit verberaverunt, vulneraverunt, &c.* Upon not guilty pleaded, the jury found both guilty; and now an exception was taken, that *insultum fecit* being the singular number, could refer only to one of the defendants, *ergo* it was uncertain which was charged, and both could not be found guilty. *Parker, C. J.* This indictment would have been very good, though the *insultum fecit* had been left out, and it had alleged only *vi et armis verberaver., vulneraver., &c.*, for there cannot be a battery and wounding without an assault, though there may be the latter without the former. * In a civil action, where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested, because the Court cannot apportion them; but in indictments the Court assesses the fine, and they will set it only according to those facts which are well laid. If an offence sufficient to maintain the indictment be well laid, it is enough. Afterwards, in *Trinity term* following, judgment was given against the defendants.

37. Domina Regina versus Cranage.

[Mich. 11 Ann. Coram Parker, C. J. At nisi prius in Middlesex.]

Indictment for
breaking the
chamber of S.
in the house of
James, and tak-
ing goods, evi-
dence, that it
was the house of

INDICTMENT, that the defendant with others at the parish of *St. Giles in the Fields*, riotously assembled, & *quoddam cubiculum cujusdam Sara S. in domo mansionali cujusdam David James fregit & intravit*, and thirty yards of stuff took and carried away. Upon evidence it appeared to be the mansion-house of *David Jamson*, and not *James*, and

and the Chief Justice held, that this did not maintain the indictment like 2 Ro. 677. Trespafs for breaking his close in *Calvering, in quodam loco vocat. Calverfield*, abutting south on a mill in the tenure of J. S. He cited the case of the Queen against *Sudbury*, indictment for an assault and battery laid as a riot; two were acquitted, and two found guilty; and all were acquitted, for the crime was the riot, and the whole charge alleged under that specification and description. So of the playhouse; indictment for acting a play and speaking obscene words, in such a parish, in a play-house in *Lincolns-Inn-Fields*; if there be no play-house in *Lincolns-Inn-Fields*, the defendant must be acquitted; for though the words are not local, yet these are made so. One may make a trespass local that is not so. If the speaking had been alleged in *Lincolns-Inn-Fields*, then it had been laid as a *venue*; but here it is otherwise, for here it is alleged as a description where the play-house stood. In the principal case, part is local, part not local; the *cubiculum* is local, the taking and carrying away is not local; but then all is put together as one entire fact under one description, and you cannot divide them.

Jamson, does not maintain the indictment.

2 Hawk. c. 46.

1. 34. Fielding's Penal Law 317.

2 Roll. Abr. 677.

Lut. 145.

Infant.

[386]

1. King *versus* Dilliston.

[Hill. 1 W. & M. B. R. Intr. Hill. 2 & 3 Jac. 2. Rot. 494.]

IN *ejectment* it was found by a special verdict, that the custom of a manor was, That if on a surrender presented, and three proclamations, the surrenderee comes not to be admitted, the lord shall seize as forfeited. Surrenderee died; three proclamations were made; his heir, an infant, did not come in; the lord seized. *Holt, C. J.* held, the infant was bound; because otherwise the lord would lose his fine; and it is not the forfeiture of the infant, but of the surrenderor, in whom the estate continues till admittance; and that, if it be a forfeiture, it is so only *quosque*. But *Dolben, Eyre, and Gregory, contra*. Custom shall not be intended to reach infants; and by *Eyre*, If it had been found expressly, that all persons, infants as well as others, &c. he had been bound; for as custom makes his inheritance, it may abridge it. And the lord cannot

Custom of a manor, that if surrenderee appears not to be admitted on three proclamations, the tenement is forfeited. Infant nor bound.

3 Mod. 2:1.

Lut. 759. 1 Ro.

Abr. 567. F. 2.

Palm. 513.

8 Co. 100.

Godb. 268.

Hob. 55. Plowd.

160 a. 372. a.

Cro. Jac. 101.

226. 3 Leon.

221. Co. Lit.

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be

262. b. Show.
Rep. 31, 32, 83,
84 to 88.
1 Lutw. 765,
S. C. 3 Mod.
223. N. L. 238.
Carth. 41.
Comb. 118.
Holt 158.
3 T. R. 165.

be said to lose a fine, for he has a tenement and no fine due, nor occasion of admittance: And here is no room to suppose a temporary forfeiture; for the jury have found the custom to be of an absolute forfeiture. Nor is the infant within the custom; for as it is found, that if the person to whom the surrender is made comes not, the bailiff of the manor may, by command of the lord, seize such tenements as forfeited. *Vide* 1 Leon. 100. 3 Leon. 221. 8 Co. 99. 2 Cro. 226. 8 Co. 44. is of such a custom, but the forfeiture is *quousque* only, as appears by the pleadings. In error on a judgment of C. B. which was affirmed (a).

(a) By stat. 9 G. 1. c. 30. s. 5., no infant or feme covert shall forfeit any copyhold estate for their neglect or refusal to come to any court and to be admitted thereto, nor for the omission, denial, or refusal to pay any fine imposed on their admittance.

2. Earle *versus* Peale.

[Hill. 10 Ann. B. R.]

Infant may buy
necessaries. Cro.
Jac. 404. pl. 15.
560, 561. Cafes
L. E. 66. S. C.
Co. Lit. 172.

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But cannot bor-
row money to
buy necessaries.
Ante 279.
2 Lill. 52. Cro.
Car. 502. pl. 2.
5 Mod. 368.
Cro. El. 920.
pl. 16. Andrews
278. Cafes B. R.
197. Espinasse
Dig. 169. Bull.
N. P. 154.
1 Ld. Raym.
344. Vide note
to Darby v Bou-
cher, ante 279.
Cumber. 381,
482. 3 Salk. 197. 5 Mod. 368.

IN *debt* upon a single bill, the defendant pleaded that he was within age; the plaintiff replied, that it was for necessaries, *viz.* 10 *l.* for clothes, and 15 *l.* money lent *pro & erga* his necessary support at the university. The defendant rejoined, that the money was lent him to spend at pleasure, *absque hoc*, that it was lent him for necessaries; and issue hereupon was found for the plaintiff, who had judgment in C. B. And now a writ of error was brought. *Et per Parker, C. J.* That which is put in issue is only, whether this money was lent the infant for necessaries, not whether it was laid out in necessaries: It may be borrowed for necessaries, but laid out and spent at a tavern: A feme covert may buy necessaries, and her act shall make the husband chargeable; but she cannot borrow money to lay out for necessaries. So it is of an infant; he may buy necessaries, but he cannot borrow money to buy; for he may misapply the money, and therefore the law will not trust him but at the peril of the lender, who must lay it out for him, or see it laid out, and then it is his providing, and his laying out so much money for necessaries for him. Judgment reversed *nisi causa*.

Inns and Inn-keepers.

1. Parkhurst *versus* Foster.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 479. S. C.]

TRESPASS for quartering a dragoon upon the plaintiff to find him meat and drink, and hay and straw for his horse, &c. Upon not guilty pleaded, a special verdict was found, that the plaintiff kept a house at *Epsom*, & *dimisit conclavia, Anglice*, lodgings, *talibus quales ibid. accedebant propter salubritatem aeris & potionem aquarum*, &c. and that he dressed meat for his lodgers at 4d. per joint, and sold them small-beer at 2d. per mug, and also found them stable-room, hay, &c. for horses, at such and such rates, and that the defendant, being a constable, quartered a dragoon upon the plaintiff.

Serjeant *Wright* and Mr. *Cowper* insisted on the 4 & 5 W. & M. c. 12. by which soldiers may be billeted upon inns, livery-stables, ale-houses, victualling-houses, and all houses selling brandy, strong water, cyder, and metheglin by retail, to be drunk in the houses, and no others, and in no private houses whatsoever. And that this house of the plaintiff's does partake of the nature of all of them; and it is a common and a public house kept for gain.

Showers and *Broderick contra*. It is against common right to quarter soldiers on any man against his will, and so is the petition of right 3 Car. 1., and 31 Car. 2. c. 1., and therefore the Court will not extend the statute of the 4 & 5 W. & M. by any equitable construction, and this is not a house within the words of that act. 1st, This is not an inn; for there men come and are entertained on access, and the inn-keeper is indictable if he refuse. 2 Ro. 84. Kel. 50. Pal. 367, 374. Here people lodge on a private contract; here he is as a lodger, there as a guest. By common law, if a guest stole goods from his lodgings, it was felony; otherwise of a lodger. If an attorney comes to town and takes a chamber in an inn for the term, he is not a guest. Mo. 877. Hetl. 49. Fitz. Hysler 49. 2dly, It is not a livery-stable; for there is accommodation for horses only; here for horse and owner. 3dly, It is not an ale-house, nor victualling-house; for they sell to all publicly, and indeed are described *quod custodivit tabernam*

5 Mod. 427, 430. One taking lodgers to lodge and diet in his house, and letting stables for their horses, not an inn-keeper within stat. 4 & 5 W. & M. c. 13. for quartering soldiers. Carth. 417. S. C. And could be answerable for all consequential damages. 5 Mod. 430.

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Lodger is on contract, guest not. Guest steals, it is felony; fecus of lodger. God. bolt 245. 8 Co. 32, &c. Cro. Jac. 214. pl. 4. 2 Brownl. 254.

communem & communis' & publice vendidit, &c. West. Symb. 71.

F. N. B. 24.
Hob. 245. Dr.
& Stud. 137. b.

Helt, C. J., when this case was set down for the resolution of the Court, gave judgment for the plaintiff, and said, the case was so plain, that there was no occasion for giving reasons.

2. York *versus* Grindstone.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 866. S. C.]

H. by leaving his horse in an inn becomes a guest, otherwise of a dead thing.
Yelv. 67.
2 Roll. Abr. 85.
A. 1 Rel. Rep. 447. Pop. 127.
3 Bulst. 269.
2 Sho. 161.
Bacon's Ab. tit. Inns. 1 Burn. Ale-houses XV. Com. Dig. Action on the Case for Negligence B.

REPLEVIN for a horse; the defendant avowed the taking and detaining, for that he kept an inn, and the plaintiff, being a traveller, came and left his horse there, where he had been kept so long, that the keeping came to such a sum, till payment whereof he detained him. Upon demurrer the whole Court held, that inn-keepers were bound to receive and entertain guests, and therefore might detain the goods of the guests till payment; but the Chief Justice doubted whether the plaintiff was a guest in this case, because he never went into the inn himself, but only left his horse there, which the inn-keeper was not obliged to receive, and without an owner did not receive as an inn-keeper. *Powell, Pours, and Gould contra*, That the plaintiff is a guest by leaving his horse, as much as if he had staid himself, because the horse must be fed, by which the inn-keeper has gain; otherwise if he had left a trunk or a dead thing. *Vide Cro. Jac. 188, 189. Noy 79. Latch 126. Pop. 178. Mo. 471 (a).*

(a) A person came to an inn, and during which time the goods were desired to leave some goods there till stolen, and the inn-keeper was held the next week, which was refused; liable, *Bennett v. Mellor*, 5 T.R. 273. he then stayed to drink something,

1. Taylor *versus* Jones.

[Mich. 8 Will. 3. B. R.]

Deed inrolled upon oath of the execution. Where two are parties, know-

A Deed may be inrolled, without the examination of the party, upon proof by witness that the party delivered it. *Godb. 270.* Party died before acknowledgment, yet the deed was inrolled. 3 Leon. 84. And if two

two are parties to a deed, and one acknowledge it before a judge, it binds the other; and at common law there was an inrolment *pro salva custodia*; and it is the practice, that if a man lives in *New England*, and would pass lands here in *England*, they join a mere nominal party with him in the deed, who acknowledges it, and it binds.

ledgment of one binds the other.
1 Leon. 183,
184. Cro. El.
717. Dyer 220.
2 Inst. 674.
3 Lev. 387.

2. Lady Anderson's Case.

[Mich. 11 Will. 3. B. R.]

THE Court made a general rule, that all deeds should be acknowledged on the plea-side in this court, and not on the Crown side; and that the acknowledgment should be in open court.

2 Lill. 69.

Joint-tenants and Tenants in [390] Common.

1. Stedman *versus* Bates.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. 64. S. C.]

IN *replevin* the defendant made consuance as bailiff to the Countess of *Salisbury*, for rent-arrear, for that *J. S.* was seized, and made a lease, &c., and died, and the reversion descended to the same Countess of *Salisbury* and her sister as heir. On demurrer the Court held this consuance naught; for by *Littleton* himself, both sisters must join; both take as heir by descent, and make but one heir, to whom the rent descends as one entire inheritance.

5 Mod. 141.
Lut. 1210.
Parceners may join in avowry.
Co. Lit. 164. a.
Comb. 347.
S. C. Cases
B. R. 86.
Carth. 346.
2 Bl. Com. 183.
2 Lutw. 1211.

2. Ward *versus* Everard.

[Hill. 10 Will. 3. B. R. Intr. Hill. 7. Rot. 718. 1 Ld. Raym. 422. S. C.]

REPLEVIN; the defendant made cognizance as bailiff to *A.* and *B.*, and shewed that Sir *Robert Carr* was seized in fee of the *locus in quo*, and granted one annuity or yearly rent of 100 *l.* to *A.*, *B.*, *C.*, *D.*, and *E.*,

Grant of 100 *l.* rent to five equally to be divided; to hold to them, viz. 20 *l.* to each,

&c. Grantees are joint-tenants. Carth. 340. Ante 226. 3 Mod. 209. Theol. Dig. 2ⁿ. p. 9. Tenants in common cannot avow jointly. Dy. 308, 309. Cro. El. 342. 241, 637, 651. Yelv. 23, 24. Cro. Car. 154. W. Jones 207. 5 Mod. 25. S. C. Comb. 329. Carth. 340. Cases B. R. 227. Holt 368. Vide 1 P. Wms. 96. 2 Eq. Ca. Ab. 535. 1 Bro. P. C. 189.

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2 Roll. Abr. 50. 4 Leon. 187. 2 Cro. 259. Cro. El. 330, 347. 3 Mod. 209. 3 Co. 39. b. Hetl. 29.

• Query if this ought not to be 20 l.?

Grant to A. and B. Hab. one acre to A. and the other to B. they are joint-tenants.

to be equally divided between them, to have and to receive to them and their respective assigns 20 l. to each during their lives, and the life of the longest liver of them; and that if any one died, his share should be equally divided among the survivors, and that *A.* and *B.* are the survivors. The plaintiff pleaded in bar an act of parliament to make void all conveyances made by Sir Robert Carr before such a time: And issue being joined, whether this grant was made before such a time, viz. April 1630, was tried at bar, and found for the avowant; and *Pemberton* moved in arrest of judgment, that tenants in common could not join in an avowry, but must avow severally. *Litt. sec.* 317. And that the grantees were tenants in common, and not joint-tenants. The cases cited on both sides were, 2 Ro. Abr. 90. Sty. 211. 2 Cro. 656. 1 Infl. 180. Dy. 351. 3 Cro. 25. 1 Saund. 282. 5 Co. 55. *Et per Holt, C. J.* The words, *equally to be divided*, cannot make a tenancy in common in a deed, though they may in a will; and the words, to have and receive 20 l. a-piece, are an explanation how the money on receipt is to be distributed, viz. so much to one, and so much to another; but do not sever the grant nor the rent; for it is not *several rents* nor *several grants*, but one rent and one grant undivided. If they were tenants in common, then each of them must avow *de quinta parte* of 100 l. and not for * 100 l. If one coparcener grants a rent of 20 l. for equality of partition to the other two, viz. 10 l. to one and 10 l. to the other, they have but one rent, and the viz. is but explanatory. 1 Infl. 169. b., which case is not to be distinguished. And the Chief Justice said, If a man grants two acres to *A.* and *B.*, *habend.* one acre to one, and the other acre to the other, the *habendum* is void and repugnant. *Hob.* 172. And so here, where the grantor has granted one rent, it is repugnant to the very words of the grant to make it several grants of several rents. Judgment to the avowant.

3. Fisher *versus* Wigg.

[Hill. 12 Will. 3. B. R. 1 Ld. Raym. 622. Comyns 88. S. C. 1 P. Wms. 14. S. C.]

Where the words, equally to be divided, make tenancy in common. In a will they do, but not in a deed. Surrender of copyhold to be construed as a will. 1 Vent. 376.

COPYHOLD lands were surrendered to the use of *A.*, *B.*, and *C.*, and their heirs, equally to be divided between them and their heirs respectively. *Gould, J.* and *Turton, J.* held this a tenancy in common, by reason of the apparent intent of the parties. [*N B.* and said, that it was here in the case of an use, which must be construed according to wills to fulfil the intent; and in the case too of a copyhold, wherein, to support the intention of the parties,

parties, limitations of estates have been admitted, which are not allowed in freeholds. 1 *Ro. Ab.* 67. 2 *Cro.* 434. *Pop.* 125. 1 *Saund.* 151. 2 *Vent.* 365.] But *Holt, C. J. contra*, held it a joint-tenancy, for that the words *equally, &c.*, import no more than was implied in the foregoing words, *i. e.* to have alike, which they cannot but have as joint-tenants; and that copyholds will not pass by more improper words than freeholds.

Cro. El. 696.
2 *And.* 17.
Benl. 36. 8 *Co.*
189. *Cro. Car.*
75. 3 *Salk.* 206.
S. C. Cases B. R.
296. *Holt* 369.
Lilly Ent. 205.
2 *Vent.* 365.
2 *Atk.* 101.
3 *Atk.* 11. 1 *P. Wms.* 71.

If a feoffment be to *A.* and *B.* equally to be divided, they are joint-tenants; for they have the land by one title and estate, and equally to be divided, imports nothing but what was implied before: But if it be to *A.* and *B.*, *habendum* one moiety to *A.* and the other to *B.*, they are tenants in common, for they have several titles, and there must be several liveries, and the *habendum* is consistent. But if it were *habendum* ten acres to one, and ten to the other, the *habendum* would be void for repugnancy.

3 *Mod.* 209.
Ante 226. *Co.*
Lit. 183. b.
2 *Roll. Ab.* 89,
90.

As for the word *divided*, he held that did not import a tenancy in common, for their possession must be entire & *pro indiviso*; to divide would be to destroy it; and it is strange to create an estate from a word which implies only what would destroy it.

3 *Lev.* 3-3.
1 *And.* 194.
Goldf. 182, 185.
Co. Lit. 187,
197. b.

Tenants in common hold by several titles or several rights; but their possession is entire. At common law they were not compellable to make partition: And therefore in suing a writ of partition, the party never shews whether he is tenant in common or joint-tenant; the possession of the one is the possession of the other, and he cannot be a disseisor without an actual ouster (*a*). *Hob.* 120. *Mo.* 868.

Co. Ent. 413,
414.

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A devise to two and their heirs equally to be divided, was formerly looked on as a joint estate. *Vide Dy.* 25, 158. *Benl.* 19. 3 *Cro.* 330. Now indeed it is an estate in common, not by force of the words, but that it appears to be the intention of the party that there should be no survivorship. A devise to two equally to be divided, *habendum* to them and the heirs of the body of the survivor, is a joint-tenancy. *Style* 211, 434.

1 *Vent.* 376.
Mo. 594, 667.
1 *Levin.* 113.
3 *Leon.* 19.
3 *Co.* 39. b.

Lastly he said, joint-tenancies were favoured, for the law loves not fractions of estates, nor to divide and multiply tenures. [N. B. Whilst the estate continues in joint-tenancy, there is no alteration of the tenure. But if you turn it into a tenancy in common, all the entire services multiply.] But judgment was given according to the opinion of the other two justices (*b*).

Br. Devise 29.
Ben 18, 19.
6 *Co.* 1. 8 *Co.*
104.

(*a*) *Vide* note to *Reading and Royston*, 2 *Salk.* 423.

(*b*) In note 4th to *Harg. Co. Lit.* 190. *b.* it is said, that as this case in

12 *Mod* [*Cases B. R.*] *Ld. Raymond* and *P. W.* is reported very much at length, and the arguments on each side are very elaborate. It is an au-

tenancy fit to be referred to wherever the doubt is, whether there shall be a tenancy in common or a joint-tenancy. In *Stringer v. Phelps*, 1 *Eq. Ca. Ab.* 291, the judgment is said to have been reversed; but that is denied by *Lee, Ch. J.* in 1 *Wig.* 341. In *Rigden v. Valier*, 3 *Atk.* 731, 2 *Vez.* 252, the opinion of *Gould* and *Furness* is affirmed by *Ld. Hardwicke* contrary to the opinion of *Holt*, and the doc-

trine extended to a covenant to stand seized. In *Gossard v. Smith*, 1 *Wils.* 341, it is extended to the case of a lease and release; and in *Denn v. Gaffney*, *Comp.* 560., Lord Mansfield says, it is certainly the better opinion, more liberal, and better founded in law.

With respect to a surrender being construed as a will, vide *Isle v. Cree*, 2 *Salk.* 620.

4. Reading's Case.

[HILL. 1 ANN. B. R.]

Tenant in common may disfein his companion.
FEE. 39. Co.
Lit. 199. b
Ante 302. Post.
423. Vide 5 Bar. 2604.

ONE tenant in common may disfein the other; but it must be by actual disfeisin, as turning him out, hindering him to enter, &c. But a bare perception of profits is not enough. *Per Cur.* (a)

(a) Vide note to *Reading and Royson*, 2 *Salk.* 423.

Joint and Several.

1. Heydon versus Heydon.

1 East 367; 12 Jur. [Mich. 5 W. & M. B. R.]

Two partners, execution against one; sheriff must seize all the goods, and sell an undivided moiety. *Show.* 174. 3 D. 306. p. 10. S. C. *Holt* 302. *Comb.* 217.

COLEMAN and Heydon were co-partners, and a judgment was against Coleman, and all the goods both of Coleman and Heydon were taken in execution: And it was held by Holt, C. J. and the Court, that the sheriff must seize all, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner (b).

(b) *R. acc. Jacky v. Butler*, 2 *Ld. Raym.* 871. In *Buckhurst v. Clinkerd*, 1 *Sho.* 174. A. and B. were partners; after seizure of the partnership goods

upon an execution against A., the sheriff returned *nulla bona* to an execution against B., which was held false. *Marrist v. Shaw*, *Com.* 274. The rule is the

the same with respect to goods levied by warrant of distress from a justice of peace, *West v. Skip*, 1 *Vez.* 239. The execution against one partner can only affect the partnership stock subject to the liens of the other, *S. C.* cited and approved, *Cowp.* 449. *Fox v. Hanbury*, *Cowp.* 449. One partner, after an act of bankruptcy by the other, and before such act by himself, *bona fide* disposed of partnership effects, the disposition was held good against the joint assignees, *Eddie v. Davidson*, *Doug.*

650. Execution being levied against *A.* upon the joint effects of *A.* and *B.*, and there being an affidavit that *B.* was entitled to an equal share of the partnership effects; the plaintiff's affidavit denied this, and charged *B.* with embezzling the joint stock. The Court referred it to the master to take an account of the partnership effects to which *B.* was entitled, and directed the sheriff to pay a part of the money levied, equal to the amount of such share, to the assignees of *B.*

2. Robinson *versus* Walker.

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[Hill. 1 Ann. B. R.]

IN covenant the plaintiff declared, that the defendant and *J. S.* *convenerunt pro se & quolibet eorum.* that they or either of them would lade such a ship, and pay for the freight, &c. The defendant pleaded in abatement, (*a*) that other covenantors were in full life not named, and prayed judgment of the writ: And it was agreed by all, that *obligamus nos & utrumque nostrum* in a bond, is joint and several. *Sed per Holt, C. J.* There is a diversity between *A. & B. conveniunt & quilibet eorum convenit*, and *A. & B. conveniunt pro se & quolibet eorum*; for in this first, *quolibet eorum convenit* expressly severs the lien, but *pro quolibet eorum* seems to go to the thing to be done, that is, that they both or either of them would do it: *Sed reliqui iussic. contra*, and judgment was, that the defendant should answer over.

7 Mod. 153, 154.
What words
make a covenant
joint and several.
Co. Lit. 144. b.
2 Co. 10. 5 Co.
53, 119, 242.
Far. 153. S. C.
3 Leon. 260.
Dyer 19, 69,
310.

vide 1 Str. 553.
2 Bur. 1190,
1197.

(a) Query, "that the other covenantor was."

Journeys Accounts.

Elstobb *versus* Thoroughgood.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 283. S. C.]

THE testator made *A.* his executor till his son came to twenty-one: *A.* brings debt, pending which the son came of age. *Et per Cur.* They make but one executor, and

Where one, not
party to the first
writ, may have
a writ by Jour-

neys Accounts.
6 Co. 10. a. b.
1 Leon. 44, 57.
Cro. Jac. 218.
pl. 8, 590.
Winch. 82.
Cro. Car. 294.
1 Lutw. 297.
Comb. 428. S.C.

Vi. 1 Ld. Raym.
432. Com. title
Abatement P.
3d edit. vol. 1. pa. 106.

and it is but one executorship, and therefore the son may bring a writ by journeys accounts, for he is privy; otherwise had *A.* been administrator *durante minori etate* of the son; for then he coming in by the ordinary, and the son by the testator, there had been no privity. So if the testator make *A.* his executor, with condition that, if he do such an act, *B.* shall be his executor; in this case *A.* is an absolute executor, unless he determine his office by his own act, and then *B.* is not privy to have journeys accounts. 2dly, A writ brought within thirty days after the abatement of the first, is a recent prosecution.

1. Holler *versus* Bush.

[Pasch. 9 Will. 3. B. R.]

Trespass. Plea that it was the horse of J. S. and the plaintiff took and impounded it, and the defendant took him by replevin, &c. amounts to the general issue.
3 Lev. 41. Cro. El. 262. Post. 580. S. C.
5 Mod. 252.
Carth. 380.
Skin. 674.
3 Salk. 272.

Cases B. R. 120. Com. Dig. Pleader, E. 14. vol. 5. 3d edit. pa. 399.

IN *trespass*, the defendant pleaded and shewed a right in the bishop of *Salisbury* by prescription, to grant *replevins* in such a manor, and that the horse in question was the horse of *J. S.* a stranger, and that the plaintiff *cepit & imparcavit equum prædict.* and that by virtue of a replevin the defendant took the said horse, &c. And the Court held this plea no more than the general issue, for it does not so much as admit a possession in the plaintiff; for the taking and impounding gained no possession to the plaintiff; but the horse was thereby only in custody of the law, and so no colour of action in the plaintiff; otherwise perhaps, if it had been *cepit & detinuit*.

2. Hatton *versus* Morfe.

[1 Ann. B. R. 2 Ld. Raym. 787. S. C.]

Payment pleaded specially in assumpsit, or given in evidence on the general issue.
Co. Lit. 282. b.
283. a. 2 Roll. Abr. 682. E. 3 Salk. 273. S. C. Holt 395; 561.

PER *Holt*, Chief Justice, In *debt* the defendant may plead a release, because it admits the contract, which is a colour of action, and yet he might give it in evidence upon *nil debet*.

So in *assumpsit*, the defendant may plead payment, because it admits the *assumpsit*, and yet he may give it in evidence on *non assumpsit*; so was the principal case, and so ruled.

Bull. Ni. Pri.
152. Eipin. 177.
Com. Dig.
Pleader, E. 24.
vol. 5. 3d edit.
p. 399.

3. Sea *versus* Taylor.

[Mich. 2 Ann. B. R.]

IN *assumpsit*, the defendant pleaded, *quod ipse performavit omnia ex parte sua performand.*; and it was ruled, that this amounts only to the general issue. *Quare*, For the *assumpsit* is admitted, so that this is but a discharge; and *quare* of the case of *Hatton and Morse ante*, if it be not *contra*.

Performance in
assumpsit amounts to the
general issue.
Cro. Jac. 544.

Britton *versus* Cole.

[Hill. 9 Will. 3. B. R. Intr. Trin. 7 Will. 3. Rot. 187. 1 Ld. Raym. 305. S. C. Comyns 51. S. C.]

ON a *levari facias* to levy the yearly value of 55 *l.* found by inquisition upon an outlawry, on a judgment in debt; the sheriffs took the beasts of a stranger, levant and couchant, on the land of the defendant; and in an action of trespass against the plaintiff in the action for taking these beasts, wherein he justified under the *levari facias*, the Court held, 1st, That by bare outlawry the party immediately forfeits his personal goods, and they are vested in the king, and he does not forfeit the profits of his lands, nor chattels real, till inquisition taken: And therefore that an alienation after outlawry, and before inquisition, is good to bar the king of the pernamcy; but if he makes a feoffment after inquisition, the feoffee has the estate, and the king shall have the profits. *Vide* 21 H. 7. 19. *Hard.* 101. *Ray* 17. *Dr. & Student*, D. 1. c. 22. 2 Ro. 159. *Lane* 79. 3 Cro. 431. 2dly, That the sheriff may well take the cattle of a stranger, levant and couchant, for they are the issues of the land. *Stat. Westm.* 2. c. 32. 2 *Inst.* 433., and the land is debtor; and if the law were otherwise, he might defeat the king of all by gifting the land; and there is better

Caith. 441.
2 *Inst.* 453.
Fleta 68. 5 *Mod.*
109, 112. *Post.*
408. Issue of
lands not forfeit-
ed by outlawry
till inquisition
taken; and ali-
enation before
inquisition is a
bar. 1 H. 7. 7.
19 H. 7. 30.
3 Cro. 431.
21 H. 7. 7. 3 D.
305. pl. 1. S. C.
Post. 408.
Comb. 434, 460.
Skin. 617. *Cases*
B. R. 175. *Holt*
421. 1 *Keb.* 57,
74, 76. Beasts
of stranger, le-
vant and cou-
chant, seizable
on a *levari fa-*
cias; so of joint-

tenant and commoner, unless the title found by the inquisition. Far. 32. 2 Salk. 448. Issues of joint-tenant for life, leviable on reversioner. 2 Roll. Abr. 157, 159. Lane 79.

better reason for their being liable in this case than for a rent-charge, which is against common right, and by the grant of the tenant. 3dly, That if there be a commoner, or another tenant in common with the defendant, his beasts may be taken upon the land, unless the title of the commoner, or the tenant in common, be found by the inquisition; and so it is of a lease for years, prior to the outlawry; for they are bound by the inquisition, and so is their title till they avoid it by *monstrans de droit* brought in the Exchequer. 4thly, That if issues be forfeited by a juror and returned upon him, his feeoffee is liable, nay, he in reversion is liable, if the juror was only tenant for life; for this being a service for the public, the inheritance itself is made debtor, and charged to answer it; otherwise of the issues forfeited, and returned upon an outlawry. The defendant or his heirs, feeoffee, or assigns, are liable as claiming under the same estate, which is charged with this debt, but it shall not charge him in reversion or remainder; for the forfeiture arises from a particular default of the tenant, and not from a charge on the inheritance. See more of this case, title *Justification*.

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Hard. 301.
Raym. 17. Post.
408.

Judge.

1. Anonymous.

[Mich. 10 Will. 3. B. R.]

Judge and party.
Ante 201.

*P*ER Holt, C. J. The mayor of *Hereford* was laid by the heels, for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole judge of the court.

2. Groenvelt *versus* Burwell & al.

[Trin. 12 Will. 3. B. R. 2 Ld. Raym. 230. Comyns 76. S. C.]

Ante 144, 200,
263. 8 Co. 41,
60. b. 10 Co.
303. a. Fitz.
Nat. Br. 73. b.
11 Co. 10. 43. b.
Where H. acts

*T*HE censors of the college of physicians in *London* are empowered to inspect, govern, and censure all practitioners of physic in *civitate London*, and seven miles round, so as to punish by fine, amerciamment, and imprisonment; they convicted Dr. *Groenvelt* of administering *insalubres pilulas*

ulas & noxia medicamenta, and fined him 20*l.*, and twelve months imprisonment; accordingly the doctor was taken in execution upon this sentence, and brought trespass against the officers and the censors: And it was held by Holt, C. J.

1st, That the censors have a judicial power; for a power to examine, convict, and punish is judicial; and they are judges of record, because they can fine and imprison. 2dly, That, being judges of the matter, what they have adjudged is not traversable; and the plaintiff cannot be admitted to gainsay what the censors have said by their judgment, viz. that they were *insalubres pillulas & noxia medicamenta*. 43 E. 3. 17. 9 E. 4. 3. 12 Co. 24, 25. But if a constable commit a man for a breach of the peace in his presence, when there was no breach of the peace, that may be traversed; for he is not a judge, nor does he act by judicial authority, though he has power to commit; for he does not commit for punishment, but for safe custody. But here is a fine set, & *finis finem litibus imponit*; by which it appears, that the cause for which a fine is set is never traversable. The matter of a verdict is not traversable; and there is no reason why the matter affirmed by the sentence of a judge should not also be untraversable, where the law intrusts him to try and determine it without a jury.

2dly, Though the pills and medicines were really *salubres pillule & bona medicamenta*, yet no action lies against the censors, because it is a wrong judgment in a matter within the limits of their jurisdiction; and a judge is not answerable, either to the king or the party, for the mistakes or errors of his judgment, in a matter of which he has jurisdiction: It would expose the justice of the nation, and no man would execute the office upon peril of being arraigned by action or indictment for every judgment he pronounces. If a justice of peace record that upon his view as a force, which is no force, he cannot be drawn in question, either by action or indictment. 12 Co. 23. And in the 27 Aff. 19. a judge of *oyer and terminer*, where the jury found and presented a fact to be a trespass, caused their finding to be entered as a felony, and yet could not be punished by indictment, or otherwise, because he was a judge of record, and the indictment against him was to defeat his record, by averring against what he did as a judge of record. Vide 1 H. 6. 4. 47 E. 3. 50. See *Vaugh. Bussell's Case*, 1 Mod. 184. 2 Mod. 218.

as a judge, his act is not traversable. Cro. Jac. 314. 2 Bulst. 64. Otherwise of an officer, as constable committing for the peace, Dyer 60. pl. 23, 69. pl. 29. March 8, 117. 118. Br. Fa. Imprist. 8. 3 Salk. 265. S.C. Carth. 421, 491. Cases B. R. 245, 386. Holt 184, 395, 536. Cart. 19. Godb. 387. Hard. 478, 481. 3 Bl. Com. 24. Cause for which fine is set is never traversable. Mod. Rep. 173. Hard. 481.

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Judge not answerable for error of judgment, either by action or indictment. Cart. 19. 9 Co. 68. a. Plowd. 13. a. 1 Rol. Abr 92. 3 Keb. 312. 1 Mod. 110, 147, &c. Vaugh. 135, &c. 2 Jon. 13. Hard. 195. Cro. Car. 395. March 8. 2 Bulst. 64. 1 Hawk. ch. 72. sect. 6. 2 Hawk. c. 1. sect. 17.

3. Wood *versus* The Mayor and Commonalty of London.

[March 2, 1701. In Error.]

Mayor and commonalty of London may limit penalties of by-laws to themselves, but they cannot be sued for in the Mayor's Court; otherwise if the mayor could be severed. Moor 412. 5 Co. 64. 2. Mod. Cases, &c. 303. 1 Lev. 15. Post. 683. S. C. Holt 740. 396. Vi. 3 Bur. 1858.

AT *Guildhall*, debt was brought in the court of the mayor and aldermen of *London*, for the penalty of a by-law made by the common-council of the city; the penalty was 400*l.*, of which 300*l.* was by the by-law to be forfeited to the use of the mayor and commonalty of the said city: Judgment was given against the defendant, and he brought error before commissioners appointed to examine those errors, *viz.* *Holt*, C. J. *Ward*, C. Baron, &c. And it was held by *Holt*, C. J. to which the rest agreed, 1st, That the mayor and commonalty might make a by-law and limit the penalty to be forfeited to themselves; because there is no way to enforce obedience but by punishment, which must necessarily be either pecuniary or corporal, as imprisonment, which is not legal, unless there be a custom to warrant it; and the direct end the by-law seeks is no more than obedience.

2 Roll. Abr. 92. A.

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* 2dly, That it might be sued for in the court of the mayor and aldermen, if the mayor could be severed, and the court held before the aldermen: Thus the chief justice of the Common Pleas may bring an action in *C. B.*, but then there must be a special entry, *viz.* *Placita coram Johanne Blencrove milite, &c.* omitting the chief justice, otherwise it would be erroneous; 8 *H.* 6. 81. But so it is good, for the other judges are a court without him: So a judge of the Common Pleas cannot take the consue of a fine in his own case.

Post. 426. 2 Cro. 204. 2 Roll. Abr. 355. Co. Lit. 112, 187. Chan. Rep. 21, 117. Dyer 304.

3dly, That if the mayor was an integral part, so as there could not be a court without him, but it must be the court of the mayor and aldermen, it could not be sued for there; for then the same person was judge and plaintiff, agent and patient, which could not be: The masters and confreres of an hospital are seized of an advowson; if the church is void, they may present a confrere, for he may be severed, and yet the corporation remains; but they cannot present the master, for he is an integral part, and the same person cannot be doner and donee: So if a bishop hath lands in both capacities, he cannot give or take to or from himself. So of a mayor, for he is the head of the corporation; and if an action be brought by the mayor and commonalty, and the mayor dies, the writ abates; for he is the head of the corporation, and by his death the corporation is suspended.

Action by mayor and commonalty abates by the death of the mayor. Co. Lit. 264. 2. Cont. Theol. Dig. l. 12. c. 1. f. 15.

Hard. 503.

4thly, Though the mayor absent himself, and the recorder sits for him, and that by the custom of the city, yet it

it alters not the case; for though the recorder sits personally, and it is personally his judgment, yet it is legally and virtually the act of the mayor: The recorder is his deputy, and his act is the act of his superior: The style of the Court is *coram majore*, &c. And a man cannot sue either before himself or his deputy.

5thly, That the case in 2 *Ro.* 93., title *Judge*, pl. 14., was law, but not for the reason there given: It was an action brought by the mayor before the mayor; but it did not appear on the face of the record that the plaintiff was mayor; for it was brought by him as *J. S.*, and he was not mayor at the commencement, but pending the action became mayor; and it could not be assigned for error, because it was not pleaded below; and it was only error in fact, and could not be averred, nor appear to the Court above without averment.

Judgments.

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1. Clerk *versus* Rowland.

[Trin. 5 W. & M. B. R.]

UPON a writ of inquiry, either on demurrer or judgment by default, executed the last day of a term, the plaintiff may enter judgment the fifth day after, and not before: So where there is a verdict, there must be four days between the verdict and the judgment; not that in all cases there can be a motion in arrest, as in the principal case, where the verdict or inquest is the last day of the term; but still there may be a writ of error, and this time is allowed for these purposes; and therefore, after verdict or writ of inquiry, the course is for the plaintiff to give a rule to enable him to enter his judgment, *nisi causa ostensa sit in contrarium infra quatuor dies*; and, in the principal case, execution was set aside, because it was sued out the fourth day after the term, the writ of inquiry being executed and returned the last day.

There must be four days exclusive between the day in bank at the signing of judgment.
1 Mod. 1.
6 Mod. 191, 2
2 Salk. 513.
Ante 77.

Crompt. Prac 300.

2. Anonymous.

[Pasch. 9 Will. 3. B. R.]

Warrant per
feme, who mar-
ries afterwards,
is revoked.

Show. 91. Ante

117. 2 Saund.

213. Far. 53. Cumber. 242. Co. Lit. 310. a. Str. 882.

IF a feme sole give a warrant to confess a judgment, and marry before it be entered, the warrant is countermanded, and judgment shall not be entered against husband and wife, for that would charge the husband (a).

(a) *Qu.* If judgment can be entered after the marriage? *Richardson's Pr.*
up so as to be a judgment at the time *B. R.* 325.
when she was sole, though really signed

3. Cooke *versus* Cooke.

[Trin. 9 Will. 3. B. R.]

Where judgment
may be entered
on the peremp-
tory rule, with-
out motion.

IN a *quare impedit* the defendant pleaded misnomer in abatement, and the plaintiff demurred, and gave the common rule to join, &c. It was held, that in all real actions one cannot enter judgment upon a peremptory rule without motion; and so in mixed actions; otherwise in personal; but this extends not to pleas in abatement, because final judgment is not given on them.

[400]

4. Duke's Case.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 267. S. C.]

Judgment for a
corporal punish-
ment cannot be
given against H.
in his absence.

Ante 56. Comb.

447. Skin. 684.

Hawk. ch. 48.

c. 17.

DUKE was upon a trial at bar convicted of perjury, and upon the *capias* he was outlawed; and upon the exigent it was moved, that judgment of the pillory might be given against him in his absence. *Et per Holt, C. J.* Judgment cannot be given against any man in his absence for a corporal punishment; there is no such precedent. If a man be outlawed of felony, execution was never awarded against the felon till brought to the bar. A *capias ad satisfaciendum domino regi pro fine* is common, but there never was a writ to take a man and put him in the pillory; and so says Sir Samuel Astry upon search of precedents.

5. Anonymous.

[Mich. 10 Will. 3. B. R.]

A *Feme covert*, who lived by herself, and acted as a feme sole, gave a warrant of attorney to confess a judgment, &c., and afterwards moved to set aside the judgment, because she was covert; but the Court would not relieve her, but put her to her writ of error.

Judgment confessed by feme covert refused to be set aside upon motion. *Far.* 115, 139. Vide note to *Carpenter v. Fauston*, ante 114. *Cumber*, 332. 7 Mod. 10. 1 Rol. 759.

6. Anonymous.

[Mich. 10 Will. 3. B. R.]

A *Motion* was made to set aside an execution on a judgment, upon suggestion of an agreement between the parties, made after the judgment given, viz. that the judgment should be upon such and such terms. *Et per Holt, C. J.* Where a judgment is confessed upon terms, it being in effect but a conditional judgment, the Court will lay their hands upon it, and see the terms performed: But where a judgment is acknowledged absolutely, and a subsequent agreement made, this does no way affect the judgment, and the Court will take no notice of it, but put the party to his action on the agreement; and in this case the agreement being only under their hands, it is no ground for an *audita querela*; and the Court cannot hold plea of an agreement upon a motion.

Where judgment is confessed upon terms, Court will take notice of them; otherwise if the agreement is subsequent. 3 Salk. 214, 212. 6 Mod. 14, 238. 7 Mod. 64, 322. 1 Show. 235. 7 Mod. 49. Rol. 133, 384.

7. Domina Regina *versus* Fitzgerald.

[401]

[Pasch. 1 Ann. B. R.]

THE defendant being convicted of a scandalous libel, judgment was given against him to pay 100 marks fine, and go to all the courts in *Westminster Hall* with a paper in his hat. In Chancery he behaved himself impudently, and justified his offence, for which reason the Court increased his punishment by imprisonment.

Judgment altered the same term, and the punishment increased.

8. Anonymous.

[Pasch. 1 Ann. B. R.]

IF a judgment be below for the plaintiff, and error is brought, and that judgment reversed; yet if the record will warrant it, the Court ought to give a new judgment

7 Mod. 2, 3. *Cumber*. 314. What judgment shall be given on

a writ of error.
Post 403. Ante
252, 387.
2 Salk. 518.
1 Mod. 1.
2 Vern. 295.
Far. 3. Rep.
B. R. Temp.
Hard. 51.
3 T. R. 658.
4 T. R. 509.
Com. Dig.
Pleaser, 3 B. 20.
vol. 5th, 3d ed.
page 7-2.

for the plaintiff: But if the judgment be erroneous, and against the plaintiff on the merits of the cause, that ought to be reversed, and a new judgment given for the plaintiff [*defendant*]. If an erroneous judgment be given for the defendant, and it is reversed, and the merits appear for the plaintiff, he shall have judgment: If the merits be against the plaintiff, the defendant shall have a new judgment. So it is in the Exchequer-Chamber; for they are to reform as well as to affirm or reverse it. 1 *Rel. Abr.* 774. *pl.* 1. *Cro. Car.* 443. *Hob.* 194.

9. Duke of Norfolk's Case.

[Trin. 1 Ann. B. R.]

Far. 53. S. C.
Judgment may
be after plaintiff's
death, provided
it be within two
terms after ver-
dict. 17 *Car.* 2.
c. 8. *Far.* 68,
Cumber 145.
196, 23, 292,
441. 3 *Salk.* 116,
&c. 2 *Lev.* 82.
6 *Mod. Cases*
191. *Hut* 400.
7 *Mod.* 35, 84.
1 *Vern.* 400, 401.
Sid. 355.

A *Verdict* was given in *Easter-Term*, and, before judgment signed, the plaintiff died. *Et per Holt, C. J.* That shall not hinder the judgment being entered, provided it be within two terms after; and the statute of frauds and perjuries only requires the time of signing (*a*) should be entered on the roll, and that is only for the benefit of purchasers; for if judgment be signed in the vacation, yet it is entered as of the term before; and none but a purchaser shall be admitted to say it was signed as of any other time; and it is the course of the Court to let all things be done in the vacation, as of the term before.

(a) But without signing, good against the party, 7 *Mod.* 2.

[402]

10. Attwood *versus* Burr.

[Mich. 1 Ann. B. R. 2 *Ld. Raym.* 821. S. C.]

Far. 3. Judg-
ment on a de-
murrer to a plea
must be entered
with, *Et quia vi-*
detur Curia quod
placit præd', &c.
S. C. 2 *Salk.*
603. 5 *Mod.*
397. 7 *Mod.* 7.
Ante 89.
S. C. *Far.* 7.
Carth. 44.
3 *Salk.* 369.
Lilly Ent. 225,
403, 890.

IN an inferior court the plaintiff demurred on the defendant's plea, and the entry of the judgment for the plaintiff on the demurrer was, *ideo considerat, est, &c.*, and not said as usual, *et quia videtur Cur. hic quod placitum prædict. præfat. defendantis minus sufficiens in lege, &c.* And now this judgment was reversed for that cause; for when a demurrer is joined, the Court ought first to determine the matter of law, whether *sufficiens*, or *minus sufficiens*, before they pronounce judgment; and by this judgment it does not appear that they determined the matter of law before them (*b*).

(b) In *Bellew v. Scott*, *Str.* 440. it was said by *Eyre, J.* that this report is not right; that, though the point was mentioned in *Mich. 1 Anne*, the cause

being till *Hil. 4 Anne*, when the judgment of the Court was reversed upon another point.

11. Cutting *versus* Williams. Hill. 1 Ann.

B. R. *Vide* this Case, title *Action sur le Case sur Assumpsit*, pag. 24. pla. 8. 7 Mod. 154.

12. Anonymous.

[Mich. 2 Ann. B. R.]

IF a man be arrested upon process *ex Communi Banco*, or any inferior court, and gives a warrant to confess a judgment in this court while in custody, no attorney being there present, we can examine and set aside this judgment ; otherwise where it is to confess a judgment in another court (a).

Warrant to confess judgment given in custody. Far. 2, 115, 139. 5 Mod. 144. 1 Mod. 1. Mod. Caf. 85. 7 Mod. 224. 3 Salk. 212.

2. 115. Case ant. 115. Cumb. 76, 224. 3 Salk. 212.

(a) By the rules both of the King's Bench and Common Pleas, no bailiff or sheriff's officer shall exact or take from any person, being in his custody by arrest, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant; *B. R. East. 15 Ch. 2. 4 Geo. 2.; C. B. 14 Geo. 2. 1 Crompt. Pr. 316.*: but an attorney of a different court is sufficient; *Vilmont v. Barry, Barnes 36.; Bland v. Pattenbam, Str. 530.* The rule must be adhered to, though the warrant be given by a person in custody in Ireland; *Fitzgerald v. Plunket, Str. 1247.* If the defendant practises as an attorney, the presence of another attorney is not necessary; *Barnes 37.*: an attorney's clerk is not sufficient; *Barnes 42.* But the rule only extends to warrants given in the particular cause wherein the defendant is in custody, and not to warrants to confess judgments in other actions; *Holcombe v. Wade, 3 Bur. 1792. R.* That it does not extend to a warrant given to a different plaintiff; *Finn v. Hutchinson, 2 Ld. Raym. 797.*; nor to warrants given by a defendant in custody under criminal process; *Charlton v. Fletcher, 4 T. R. 433.* (being made to prevent the ducels of imprisonment, at the suit of the party himself): nor to persons in custody on execution, unless they are prevailed upon to acknowledge a judgment for more money than is really due; *Watkins v.*

Hanbury, Str. 1245.; Fell v. Riley, Cowp. 281.; Birch v. Sharland, 1 T. R. 715. The defendant, being in the custody of the marshal after interlocutory judgment, gave a warrant for 200*l.*, with a defeasance on payment of 49*l.* the debt admitted to be due, and 8*l.* for costs; not having an attorney present; the Court granted a rule to shew cause, why judgment signed thereon should not be set aside for irregularity, and were about to make it absolute; but the plaintiff proposed to have the judgment altered to 49*l.*, and to allow the costs of the application; which the Court ordered: *Parkinson v. Caines, 3 T. R. 616.* The above case was held not to be strictly within the rule, but to depend upon its own circumstances. It was urged, that the rule did not extend to a *cognovit*, or a defendant in prison, *via* case of judgment and execution, upon a warrant given by the defendant, (being in custody at the suit of *A.*, to the plaintiff, as a security for becoming bail, and for another demand payable at a future day, for which the plaintiff had been bound with him.) being set aside, as well upon this rule as for circumstances of oppression; *Ruffie v. Hitchcock, 2 Bl. Rep. 1097.* Where a warrant was obtained from a defendant, in custody by process of the King's Bench, to confess judgment in the Common Pleas, the King's Bench could not set the judgment

ment aside, but granted an attachment against the plaintiff and his attorney, to lie in the sheriff's hands a week, to be executed, unless he consented in C. B. to satisfaction being entered, or to the judgment being set aside, with costs; *Woodin v. College, B. R. H. 177*. Where the defendant swore that he was the more induced to sign the warrant of attorney, because he was in-

formed that if he did execute it under an arrest, and without his attorney being present, it would be void; the rule for setting aside the judgment was discharged, with costs, as the Court would not permit a defendant to convert that which was meant for his protection into an instrument of fraud and deceit: *Gilman v. Hill, Cowp. 142*.

13. Sifted *versus* Lee.

[Mich. 3 Ann. B. R.]

Setting aside
judgment.
Vide 1 Bl.
Rep. 35.

UPON payment of costs, the Court will set aside a judgment, though it be regularly entered, if the plaintiff hath not lost a trial; and so is the common course in C. B.

14. Anonymous.

[Pasch. 4 Ann. B. R.]

No reference for
irregularity after
error brought.

THE defendant, against whom judgment was recovered, brought a writ of error, and afterwards got a reference to the master to examine the regularity of the judgment; and the Court, upon the master's report, were of opinion, that by bringing the writ of error the judgment was admitted to be regular, and that he should not examine that now; and the rule was discharged.

[403]

15. Phillips *versus* Berry.

[Trin. 6 Ann. B. R. S. C. Ld. Raym. 5. Comb. 265. 1 Show. 360. Skin. 447.]

If a judgment of
B. R. be entered
in parliament,
the judgment
must be entered
there. Cro. Jac.
206. Noy 129.
Yelv. 76. Show.
P. C. 51. S. C.
Holt 402. Rep.
B. R. Temp.
Hard. 51.
Cumb. 314.
Skin. 514, 616.
Gresh. 180, 319.
320.

IN *ejectment*, judgment was given in B. R. for the defendant; a writ of error was brought in the House of Lords, who reversed the said judgment; whereupon the plaintiff applied to the Court of King's Bench to enter up the judgment given by the House of Lords; and it was urged, that a judgment must be given either by the Lords, or by this Court: That the Lords could not, because they have only the transcript of the record before them; therefore this Court must, lest there should be defect of justice, like the case of *Skaldoe and Ridge, Yelv. 74*. In trespass, judgment in B. R. was given for the defendant; error was brought in the Exchequer-Chamber, and the first judg-

judgment was reversed, and the record returned in *B. R.* The Court of *B. R.* gave judgment *quod querens recuperet*, and a precedent was shewn in *Winchcomb's* case, where the same course was taken. *Holt, C. J.* The House of Lords have, in judgment of law, the very record before them; [*sed quer de ceo, Car. 1. Sid. 236. il est dit, que dett gift in B. R. pendent error in parliament; que ne poeste estre, si le very record est remove. 1 Rol. Abr. 753. pl. 10.*] For the writ of error says, *recordum & processum*, and not *transcriptum*; and he took this difference, If ejectment is brought in *B. R.*, and upon a special verdict judgment is given for the defendant, and this judgment is reversed in the Exchequer-Chamber, that Court shall give judgment and enter it: but had it been upon demurrer, this Court should have entered the new judgment, because the Exchequer-Chamber could not have awarded a writ of inquiry of damages. Further he said, If judgment be first given for the plaintiff, and that be reversed in error, the defendant is *in statu quo* thereby, and no new judgment need be given. But if the first judgment was given for the defendant, and that is reversed, a new judgment must be given to put the plaintiff in possession of what he demands: And the Court agreed they could not enter a new judgment for the plaintiff, because when they have given judgment on the original, they have executed their whole authority, and there is no precedent that this court ever entered a new judgment, where the judgment given here was reversed in parliament: And afterwards application was made to the Lords, and they entered the new judgment.

If judgment for the defendant on a special verdict be reversed in the Exchequer-chamber, that Court shall give the new judgment. Otherwise on demurrer. Ante 401, 262. Far. 3. 2 Saund. 256. 1 Lev. 310. Cro. Car. 509, 512. 1 Vent. 28. 2 Danv. title Error 59. Noy 129. 1 Roll. Abr. 805. 2 Inst. 23. 4 Inst. 71. Cro. Car. 442.

Jurisdiction.

[404]

I. *Stannian versus Davis.*

[Mich. 3 Ann. B. R. 2 Ld. Raym. 795. S. C.]

ERROR of a judgment in the Palace-court, in an action on the case, wherein the plaintiff declared, that such a day, in such a parish in the county of *Middlesex*, he delivered to the defendant (being an inn-keeper) a gelding, safely to be kept in his inn, and that he suffered him to be taken out of his stable, and rid so immoderately that the gelding was spoiled: And it was objected as error, that

Andrews 160. Rep. A. Q. 7. S. C. 6 Mod. 223. Holt 13. In inferior courts every thing that makes the gift of the action must be laid within

the jurisdiction; otherwise of matter of aggravation. Vide ante 209. 1 Lev. 50, 69, 96, 105, 137, 1:6, 208, 209. 1 Mod. 32. 2 Lev. 87. 2 Show. 430. 1 Sid. 103, 343, 180. 1 Kol. 545. Cro. Car. 571. 1 Vent. 2. Freem. 317.

the riding did not appear to be within the jurisdiction of the Palace-court. *Et per Cur.* In actions in inferior courts, it is necessary that every part of that which is the gist of the action should appear to be within their jurisdiction; otherwise of such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remain.

In case for calling the plaintiff whore, *per quod maritag. amisit*, the loss of marriage must be laid to be *infra jurisdictionem*, for that is the gist of the action; otherwise for calling her thief, &c. So in the principal case, the neglect in keeping is the gist of the action: The taking and riding is a subsequent wrong, and a measure only of damages. Judgment affirmed. 1 Saund. 72. 1 Cro. 570. 1 Ro. 546. 1 Jones 448. (a)

(a) Vide 7 Vin. Abr. 19., where the doctrine of this case is confirmed by several determinations. In *indebitatus assumpsit*, it is necessary to lay the consideration, but not the promise (which arises by operation of law) within the jurisdiction; *Baker v. Holman*, Freem. 317.; — *v. Lee*, 1 Ld. Raym. 211.; *Winford v. Powell*, 2 Ld. Raym. 1310.; *Waldock v. Cooper*, 2 Will. 15.; *Trevor v. Wall*, 1 T. R. 151. But upon an account stated, or a promissory note for value received, it is not necessary to lay the items of the account, or the receipt of value, *infra jurisdictionem*; *Emery v. Bartlett*, 2 Ld. Raym. 1555.; 2 Str. 827.: So if a bond be given within the jurisdiction, it is immaterial where the debt was contracted; *Pillars v. Cary*, 6 Mod. 303. Trespass for taking goods extra, and disposing of them *jurisdic.*, is bad; *Keibey v. Nodes*, Str. 313.— *Secus*, if it had been trover; *dict. ibid.* If one count be laid *infra jurisdictionem*, and another not, after a general verdict for the plaintiff, a Court of Error cannot grant a *venire de novo*, or apply the verdict to the right count; *Trevor v. Wall*, *ubi supra*. It does not seem to have been positively settled, whether upon the jurisdiction being stated by the declaration, and not denied by the plea, advantage can be taken of the cause of action not being proved upon the trial to have arisen within the jurisdiction. In *Gilb. C. B.* 189. 1 Bac. Abr. 503., it is said, "That the cause of action must not only be alleged with-

in the jurisdiction, but it must be proved upon the trial; and if the plaintiff prove a consideration out of the jurisdiction, that cannot be given in evidence; and if it be, the defendant's counsel may propose a bill of exceptions." Bacon adds, "And upon such bill of exceptions the judgment will appear erroneous." In *Higginson v. Martin*, 2 Mod. 195. Freem. 322. the Court appear to have entertained a difference of opinion upon the subject being *obiter* discussed. But in *Luttin v. Menin*, 11 Mod. 51. *per Holt*, jurisdiction is admitted by plea; and, by admitting it, the defendant is for ever after estopped; *S. C. ante* 201., by the name of *Lucking v. Denning*; *per Powell*, Baron, *Gwynn v. Pool*, 2 Lutw. 1565. Where it appears in the declaration that the cause arose out of the jurisdiction, all the proceedings will be *coram non judge*; but, where nothing of this appears thereby, it must be notified to the Court by the plea of the defendant to the jurisdiction; *Anon.* 11 Mod. 132. *Per Holt*, If a person pleads in chief, he shall never assign this for error, if the inferior court has jurisdiction of the thing. Vide also 1 Vent. 88, 181, 236—369. In *Rowland v. Peale*, Cowp. 18., the defendant to an action of trespass pleaded, that he levied his plaint for a cause of action arising within the jurisdiction, &c.; on an objection that he did not state that the plaintiff became indebted within the jurisdiction, Lord Mansfield said, "If the cause of action did not arise

arise within the jurisdiction, the defendant should have availed himself of it by plea in the court below; or, if it was not alleged to be within the jurisdiction, he might have taken advantage of it as error. But as he has not taken either of those methods, the presumption is, that the cause of action did arise within the jurisdiction:—"without alluding to the right of making such defence at the trial. The opinion in these several cases, although collateral to the subject of decision, seems to destroy any authority which might be attributed to the position in *Gilbert and Bacon*, and is conformable to the general rule, that where any matter may be pleaded in abatement, or to the jurisdiction, it shall never be assigned for error, 28 E. 3. 10. b.

3 H. 4. 6. b. 29 Aff. 35. *Sbo.* 169. *Cartb.* 123. 12 *Mod.* 689. Plea of a former action, and judgment for the defendant, in an inferior court, is bad, if the cause appear to be out of the jurisdiction; *Mico v. Morris*, 3 *Lev.* 234.

The courts of the counties palatine are superior courts, and it is not necessary that the cause of action in them should be stated within the jurisdiction, *Peacock v. Bell*, 1 *Saund.* 73.

On actions in superior courts every thing is supposed to be done within their jurisdiction, unless the contrary appears; on the other hand, nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged, *Gilb. C. B.* 188. 1 *Saund.* 73. 2 *Ld. Raym.* 311.

2. Anonymous.

[Pasch. 4 Ann. In Canc. 2 Vern. 494. S. C. by the name of Toller v. Carteret.]

A Bill was brought in Chancery to foreclose a mortgage of the island of *Sarke*; the defendant pleaded to the jurisdiction of the Court, viz. that the islands of *Sarke*, *Guernsey*, *Jersey*, &c., were four islands governed by the laws of the duchy of *Normandy*. And it was objected, that bills to redeem were ancient, but bills to foreclose were of a later day: That Serjeant *Hutchins* had said, he remembered the first of them; that the party ought to sue in the courts of the island, and appeal.

On the other side it was said, that Chancery *agit in personam*; that if the person be here, he may be sued in Chancery, though the lands lie in a county palatine, or in another kingdom, as *Ireland* or *Barbadoes*. And *Wright*, Lord-keeper, over-ruled the plea, saying, The Court acted against the person of the party and his conscience; and there might be a failure of justice if the Chancery would not hold plea in such case, the party being here, and the whole island in mortgage (a).

Bill may be brought in Chancery to foreclose mortgage on lands out of the jurisdiction of the court, if the person be within it. Chancery agit in personam.

[405]

(a) The Court of Chancery here will entertain a bill to account for the profits of an estate in *Ireland*, *Cartwright v. Pettus*, 2 *Ch. Caf.* 214; or to relieve against a fraudulent deed obtained in *England*, or perform a contract, or execute a trust, concerning

such estate; *Earl of Arglas v. Muschamp*, 1 *Vern.* 75, 135. *Archer v. Preston*, cited *ibid.* *Earl of Kildare v. Eustace*, 1 *Vern.* 405. 1 *Eq. Ca. Ab.* 133; but will not decree a partition which is in the realty, *Cartwright v. Pettus*. A bill to have a discovery concerning

concerning the general title to the Isle of *Mann*, and to have relief upon a particular point of equity, relating to the rectories and tithes within that island, was held maintainable in Chancery, and the authority of this case allowed; *Earl of Derby v. Duke of Athol*, 1 *Vez.* 202. So the Court car-

ried into execution an agreement between the plaintiff and defendant, resident in *England*, concerning the boundaries of two provinces in *America*; *Penn v. Ld. Baltimore*, 1 *Vez.* 444. *Vide* the *Nabob of Arcot v. the E. India Comp.*, 3 *Bro.* 292. *Vide* also *Com. ch.* 3. X.

Jury and Juror.

1. Anonymous.

[*Trin.* 8 *Will.* 3. *B. R.*]

Jury struck by the Master, and the practice thereon. 2 *Lill.* 127. *Vide* ante 395.

A Rule was made, that when the Master is to strike a jury, viz. forty-eight out of the freeholders' book, he shall give notice to the attornies of both sides to be present, and if one comes and the other does not, he that appears shall, according to the ancient course, strike out twelve; and the Master shall strike out the other twelve for him that is absent.

2. Anonymous.

[*Mich.* 8 *Will.* 3. *B. R.*]

IF by rule of Court the Master is ordered to strike a jury, in case it be not expressed in such rule, that the Master shall strike forty-eight, and each of the parties shall strike out twelve; the Master is to strike twenty-four, and the parties have no liberty to strike out any.

3. Anonymous.

[*Pas.* 1 *Ann.* *B. R.*]

Fa. 2. Ought to acquaint the Court that they can give evidence, before they are sworn.

IF a jury give a verdict on their own knowledge, they ought to tell the Court so, that they may be sworn as witnesses; and the fair way is to tell the Court before they are sworn, that they have evidence to give.

Vi. 3 *Com.* 374. 7 *Mod.* 2. 2 *Sid.* 133. *Sty.* 233.

Justices of Peace.

1. Anonymous.

[Hill. 4 Ann. B. R.]

PER *Holt*, C. J. The most regular way for justices to proceed upon the 14 *Car.* 2., in removing a poor person, is to make a record of the complaint and adjudication, and upon that to make a warrant under their hands and seals to the churchwardens, to convey the persons to the parish to which they ought to be sent, and deliver in the record *per proprias manus* into Court next sessions, to be kept there amongst the records, to charge the parish; and that record may be well removed by a general *certiorari* to the justices of peace: Mr. *Broderick* said he had advised the justices in *Surry* to do so.

Proper proceeding upon statute 14 *Car.* 2. in removals of poor. 14 *Car.* 2. cap. 12.

Vi. 3 *Burn*, Poor (Removal), 16th edition, p. 577.

2. Domina Regina *versus* Yarrington.

[Mich. 9 Ann. B. R.]

INDICTMENT was found at the sessions of the peace for forging a letter in the name of *J. S., &c.*, and was brought into *B. R.* by *certiorari*, and, upon motion in arrest of judgment, the Court held, that no indictment lay before justices of peace for forgery; for their power is created by act of parliament within time of memory, and they have no other authority than what is thereby given them; and the general words of their commission *de omnibus aliis transgressionibus & malefactis quibuscunque*, must be understood of such crimes as they have power over by the several statutes which created or enlarged their power: So it is for perjury at common law; but perjury upon 5 *Eliz.* 2 *Hawk.* ch. 8. is indictable before the justices of sessions, because it is so appointed by the particular provision of that statute (a).

Indictment for forgery lies not before justices of peace. *Dyer* 69. pl. 29.

f. 38.

Vide plus, titles Poor, Orders, Sessions.

(a) Justices of peace have jurisdiction of all inferior crimes mentioned in their commission, whether such crimes be mentioned in any statute concerning them or not; 2 *Hawk.* ch. 8. f. 39. They have also jurisdiction over such offences as have a tendency to cause breaches of the peace, *id.* f. 38.; as libels, 1 *Lev.* 139.; conspiracies, *Rex v. Rispal*, 3 *Bur.* 1320. They may inquire of any thing done to the fraud or deceit of another, *Com. Justice of Peace B.* 32.;

B. 32.; of nuisances, *Burn, Nuisance*. They have no authority concerning offences newly created by statute, except by express words; 4 *Mod.* 51, 379. 5 *Mod.* 149. *Regina v. Smith*, *post* 620. *Rex v. James, Str.* 1256.

1. *Atkinson versus Crouch.*

[Mich. 2 W. & M. B. R.]

Justification by
1 *Eliz. c. 17.*
ill for want of
showing a war-
rant. Show.
Re. 62. Cro.
El. 748. Ante
107. 3 *Lev. 20.*
Cro. Car. 372.

IN *trespass* for taking salmon: The defendant justified the taking the salmon, being caught at an undue season, under the stat. 1 *Eliz. c. 17.*, and that he was a constable; and upon demurrer the Court held the plea ill for want of shewing a warrant; for that the constable could not intermeddle without warrant, nor the leet without a presentment. Plaintiff had judgment.

2. *Leewerd & Ux. versus Basilee.*[Mich. 7 Will. 3. B. R. 1 *Ld. Raym.* 62. S. C.]

Wife may justify
assault in defence
of her husband.
1 *Mod.* 34. 1 *Sid.*
441. 2 *Keb.*
567. 1 *Leon.*
283. 1 *Lev.*
282. 35 *H. 6.*
pl. 51. Servant
of his master;
but not vice versa.
1 *Roll. Re.* 19.
2 *Ro. Abr.* 546.
D. 2. contra.
Not of his free-
hold, but must
plead *molliter*,
&c.

IN *trespass* by husband and wife for assault and battery on the wife, the defendant pleaded *son assault demesne* of the wife. The plaintiff replied, that the defendant was going to wound her husband, and that she *insultum fecit* to defend him (a). To this the defendant demurred; and *Cartbrow* for the defendant insisted, that *insultum fecit* was naught; and to prove it, cited a case *Trin. 21 Car. 2. Rot. 1821.* where the defendant pleaded *insultum fecit* in defence of his possession, which was held ill, and that he should have pleaded *molliter manus imposuit. Quod fuit concessum per Curiam.* But the Court said this differed, for that the wife might justify an assault in defence of her husband; so might a servant of his master; but not (b) a master in defence of his servant, because he might have an action *per quod servitium amittit*. If the defendant was holding up his hand to strike the husband, the wife might make an assault to prevent the blow. But a man can-

(a) *Vide Str.* 933.(b) *Qu* and *vide* 1 *Hawk.* ch. 60.f. 24. 2 *Rolle's Abr.* 546: 1 *Comen.*

429.

not justify an assault in defence of his house or close, but must plead *molliter manus imposuit*. Judgment for the plaintiff.

3. Swinthead *versus* Lyddal.

[408]

[Mich. 8 Will. 3. B. R. Intr. Trin. 8 Will. 3. Rot. 229.]

IN an action of trespass and false imprisonment for such a time, & *quousque* he paid 11*s*. The defendant pleaded the stat. 3 Jac. 1. c. 15. for erecting a Court of Conscience in London, and that *tali die* the plaintiff was summoned to appear, and the process continued till such a day, and then the Court made an order that he should be carried to the Compter and imprisoned *quousque* he paid 7*s*. debt, and 2*s*. 6*d*. for costs; *virtute cujus ordinis*, he being an officer, took him and detained him, &c. Plaintiff demurred. *Et per Cur.*

5 Mod. 295.
Skin. 664. S. C.
3 Salk. 219. In
imprisonment,
justification un-
der order of the
Court of Con-
science to carry
plaintiff to the
Compter, ill; be-
cause imprison-
ment confessed,
and not shewn to
be in the Compter.
2 Jones
215. 2 Vent. 94.

1st, The Court of Conscience erected by 3 Jac. 1. c. 15. have, by the very erection, incidentally and consequently, a power to continue their process. 2dly, Though he does not answer the detaining *quousque* he paid 11*s*., yet the plea is well enough, for the *quousque* is not the cause of action, but the imprisonment: the *quousque* is but matter of aggravation. If the defendant had said nothing to the money, it had been a good justification; as if one bring an action of trespass for taking his horse and riding him immoderately, it is sufficient to justify the taking, for that is the trespass; and if the case was, that the plaintiff paid the officer 9*s*. 6*d*., and nevertheless the officer detained him for more, the plaintiff should reply it (a). *Vide Moor* 704, 705. 3dly, The Court held the plea naught, because the order was to carry him to the Compter; and though he confesses he detained him six hours, he does not shew it was in the Compter, or in carrying him thither; and this differs from the case of a common arrest; the officer in that case may make any place his prison, because the writ is, *ita quod habeas corpus ejus coram*, &c. *apud Westm.*, which is a general authority; but here it is a special authority to take and carry him to the Compter.

Com. Dig. Plead-
er 3 M. 24. vol.
5th, 3d edition,
page 797.

Co. Lit. 49. b.
52. b. 253, 303.
b.

(a) *R. ac. Gates v. Bayley*, 2 Wils. *Taylor v. Cole*, 3 T. R. 292. *H. Bl.* 313. *Dye v. Leatberdale*, 3 Wils. 20. 555.

4. Britton *versus* Cole.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 305. S. C. Comyns 51.
S. C. Pleadings, 3 Ld. Raym. 145.]

S. C. 5 Mod.
109. Ante 395.
Comb. 434.
Carth. 441.
22 Mod. 175.
Skin. 617.

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If H. requests
another to take
goods, he is a
trespasser.

Cro. Car. 446.
pl. 17. 447.
Vid. 2 Lill. 135.
Post. 410.
2 Vent. 94.
In trespass for
taking goods,
the officer need
only shew a writ
of execution;
otherwise of a
common person,
unless in aid of
the officer by his
command. The
command is tra-
versable. Ante
107. Lutw.
1566. Cro. Car.
394. 3 Lev. 20.
1 Leon. 50.
2 Leon. 196.
215, 216. Cro.
El. 14. pl. 3.
Str. 1184.
Cowp. 13. 1 Will. 17. Com. Dig. Pleader, 3 M. 24. Bull. N. P. 83.

IN *trespass* against *J. Cole*, for taking forty-three sheep, the defendant pleaded, that a *levari* issued *ex Cam. Scacc.*, which recited a judgment in debt, obtained by *J. Cole* in *C. B.*, and an outlawry and seizure, and an inquisition returned, which found the land and the value to be 55 *l. per annum*; and by this *levari* the sheriff was commanded to levy the said 55 *l. de exitibus & proficuis terra*, and that on a warrant of the sheriff to *A. and B. bailiffs*, the now defendant requested them to take these cattle. On demurrer it was held, that the Court could not take notice that *John Cole* the defendant was the *John Cole* mentioned and recited to be the plaintiff in *C. B.*, but that ought to have been averred; yet that, however, his requesting the bailiffs not to execute their writ, but to take these particular cattle, was a sufficient confession of a trespass: But then they held, that whether the defendant was concerned as the original plaintiff, or concerned himself of his own head as a stranger, he had not justified; and these diversities were taken and agreed:

That in trespass against the sheriff, it is enough for his justification to shew a writ: So it is in the case of his bailiff or officer; with this difference, that the sheriff must shew the writ was returned, if returnable; the bailiff need not, because it is not in his power: But in trespass against the plaintiff himself or a mere stranger, they cannot justify themselves unless they shew there was a judgment as well as an execution; for the judgment may be reversed, and it ought to be at their peril, if they take out execution afterwards; but they seemed to hold, that if one comes in aid of the officer, at his request, he may justify as the officer may do; but such request or command of the officer is traversable: As in trespass, if the defendant justifies damage-feasant, or by distress for rent, he must make himself bailiff to the person having right, or [*and*] that he did it by his command, but the command is traversable; otherwise in replevin, where *H.* makes conuzance on the right. 1 *Leon.* 150. 2 *Leon.* 115. 1 *Ro. Rep.* 46.

5. Freeman *versus* Blewitt.

[Hill. 12 Will. 3. B. R. 1 Ld. Raym. 632. S. C.]

TRESPASS for taking the plaintiff's goods; the defendant pleaded, that a plaint in replevin was entered in the sheriffs court in *London*; that the defendant was serjeant at mace, and a precept came to him to replevy these goods, which he did accordingly. Upon demurrer it was objected, that the defendant was principal officer, and his precept was returnable, and yet he does not shew it was returned. But *Broderick contra* urged, that the replevin differs, for it is not returnable, and never is so pleaded, *Dy.* 189. and several other cases. After two arguments, it was ruled by *Holt*, C. J. to which the rest agreed, that wherever a principal officer is to justify under a returnable process, he must shew that the writ was returned; for he is commanded to return the writ, and shall not be protected by it, unless he shews that he paid a due and full obedience in acting under it: So it is of a *feri facias* or *capias*; the sheriff cannot justify under them without shewing a return; for these writs are, *ita quod habeas corpus*, or *denarios illos apud Westm.*, but any subordinate officer, as a bailiff, may. *Vide* 20 *H.* 7. 13. 21 *H.* 7. 22. 3 *Lev.* 204. 5 *Co.* 90. a. *Br. Trespass*, 48, 76, 104, 154. *Fitz. Trespass*, 198. Now a replevin, or an *alias* replevin, are not returnable process; they are only in nature of a *justicies* to empower the sheriff to a plea in his county court, where a day is given them; but there is no return to be made to the first or second writ, and therefore whoever justifies under the first writ of replevin, or the *alias*, need shew no return; but the *pluries* replevin is always with this clause, *vel causum nobis significes*, and therefore it is a returnable process; and if any principal officer that has the return of it, pretends to justify under it, he must shew it was returned; otherwise of a subordinate officer. In the case at bar the defendant is a principal officer: If the prisoner escape, the action must be brought against him; and this process under which he justifies, was a returnable process. And judgment was entered for the plaintiff.

Serjeant at mace justifies under precept, on a plaint in replevin out of the sheriff's court; ill for want of shewing it was returned. Where a principal officer justifies under a returnable writ, he must shew it was returned. Secus of subordinate officers. S. C. Cases B. R. 394. *Holt* 408.

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Lane 52. Moor 57. Owen 48. Latch. 223. 4 Co. 67. a. Cro. El. 17. pl. 8. Post. 58. Cro. Car. 447. Antc, pl. 4. Vide Str. 1184. Comp. 18. 2 Will. 5. Fort. 379. Comyns, Plead. 3 M. 29.

ERRATA AND ADDENDA.

- Page*
 28. *pl. 18. n. (a), for git read gift—for*
1 T. R. 281. read 285.—col. 4. line 15.
dele and—for Pany read Perry—for
Shatton read Stratton—for 5 Bur. 259
read 2589—after 2 T. R. 161. add
3 T. R. 266.
 34. *n. (a), for 397. read 367.—for Baxton*
read Buxton.
 47. *n. (b), add 1 Crom. Prac. 106.*
 53. *pl. 17. n. (a), for 209. read 2.—for 24.*
read 73.
pl. 18. n. (a), for 4 T. R. read 3 T. R.—
after 3 T. R. 619. add vide 3 T. R.
749—after 5 Bur. 2661. add 2 T. R.
281.
 68. *pl. 8. n. (a), for 592. read 592a.*
 70. *pl. 2. n. (a), for Bardel read Burdett.*
 71. *n. (a), col. 2. l. 7. for id. ibid. read id.*
251.—after Lequefme insert 2 Vex.—
for Montefau read Montefiori.
 99. *Anon. n. (a), add, from the case of Cooke*
v. Dobree, H. Bl. 10. it may be ques-
tioned, whether the distinction between
the practice of B. R. and C. B. con-
tinues
 200. *pl. 13. n. (a), l. 6. dele he—l. 7. for Pet*
read Petit.
 202. *n. (b), for Mone read Moore.*
 211. *n. (a), for 610. read 648.—for Deas v.*
Freeman read Bradley v. Clarke.
 214. *pl. 2. n. (a), for Duckham read Durham.*
 215. *n. (a), col. 4. l. 4. for was read is.*
 219. *n. (a), col. 2. l. 14. for plaintiff read*
defendant.
 224. *n. (a), B. for atisfaction read satisfaction.*
 225. *n. (b), l. 11. for indorser read drawer.*
 227. *n. (c), for acceptor read acceptor.*
 228. *n. (a), for Huft read Hirt—for acceptor*
read acceptor.
 231. *n. (a), for 683. read 61.—for general*
read special.
 233. *n. (8), prefix vide.*
 246. *n. (a), for 2439. read 2459.*
 248. *n. (d), for person read paison—for and*
343. read Andrews—for Con. read Car.
 255. *to n. (b), add 1 Wms. 409. and Cox's*
note.
 258. *n. (a), after Waring add Cox's note to*
P. Wms. 120.
 275. *n. (a) dele it seems—for Kemb. read*
Kemp.
 298. *n. (a), to 2 Atk. 558. add [542.]*

- Page*
 208. *n. (b), for Jolly read Tolly.*
 203. *n. (a), for 148. read 269.*
 207. *n. (a), for 334. read 234.*
 224. *n. (c), for 4 T. R. read 3 T. R.*
 227. *n. (a), for 1831. read 1881.*
 231. *n. (a), for 41. read 43.*
 239. *n. (a), for 215. read 235—add Denn v.*
Moore, 5 T. R. 558.
 272. *n. (a), for 187. read 117.*
 274. *n. (a), col. 3. l. 3. for then read there—*
col. 4. l. 6. for in read on.
 281. *n. (b), for Bromwick's read Bromwicks.*
 283. *n. (a), pl. 12. for Martin read Masters.*
n. (a), pl. 13. for 1 Will read 3 Will.—
for 359. read 373.—for Martin read
Masters—for 2—69 read 269.
 285. *n. (a), for 4 Bur. read 2 Bur.—between*
B and vide, insert 4 T. R. 669.
 286. *n. (a), for 1 Bl. read 2 Bl.*
 286. *n. (b), before Callow insert vide.*
 292. *n. (a), for 444. read 445.*
 296. *n. (a), for seperate read sperate.*
 303-304. *n. (b), add Rawlinson v. Shaw,*
3 T. R. 557.
 310. *n. (a), for Ewing read Erving.*
 320. *n. (a), after Wrangham read v. Kerley.*
 322. *n. (a), for Kemp read Kempland.—*
[Since this note was printed, it has
been ruled that the refusing to stay pro-
ceedings pending error, must be con-
fined to cases where the party himself,
his attorney or bail, declare that the writ
of error is brought only for delay; Le-
vett v. Perry, 5 T. R. 669.]
 327. *n. (a), for 137. read 237.—for 280*
read 480. Price v. Langford, 336. The
note (a) to Symonds v. Cudmore, 338.
belongs to this case; in that note, be-
tween entitled and infant, insert Good-
right v. Wells, Doug. 71.
 338. *n. (a), vide the preceding article.*
 345. *n. (c), for 1126. read 1226.*
 357. *n. (a), for Oxford read Orford.*
 380. *n. (a), dele where.*
 386. *n. (a), for 30. read 29.*
 401. *n. (b), for being read hung.*
 402. *n. (a), for via read vide.*
 404. *n. (a), for 311 read 1311.—add to the*
observations respecting the cause of action
appearing at the trial to arise out of the
jurisdiction, vide tamen Taylor v. Blair,
3 T. R. 453.





